

The Jewish Home for the Elderly of Fairfield County and New England Health Care Employees Union, District 1199, SEIU, AFL-CIO. Cases 34-CA-9920, 34-CA-10063, 34-CA-10099, 34-CA-10127, 34-CA-10167, and 34-RC-1947

December 16, 2004

**DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION**

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On November 21, 2003, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, the General Counsel filed limited exceptions and a supporting brief, the Respondent and the General Counsel filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³

¹ No exceptions were filed to the judge's dismissal of allegations concerning: (1) the confidentiality rule contained in the corporate compliance program handbook; (2) Dennis Magid's prohibiting employees from discussing the Union at any time at the Respondent's facility; (3) Linda DiGangi's prohibiting employees from engaging in union activities while at work; (4) Jeannette Laidlaw's prohibiting Tawana Williams from campaigning with employees who were working in an immediate patient care area; (5) Laidlaw's restricting the location of employee breaks; (6) threatening employees with arrest; (7) creating the impression of surveillance by installing new surveillance cameras; (8) creating the impression of surveillance through statements made by Nursing Supervisor Debra Straubel to employee Marciana Lozada; (9) creating the impression of surveillance by the statement or conduct of Vice President Michael Silverman; (10) monitoring of employee Williams; (11) creating the impression of surveillance through Laidlaw on April 10; (12) Art Caplan's videotaping of employees; (13) soliciting employees to revoke their union membership by stapling instructions to their paychecks and by posting instructions; (14) discharging Misty Hinds; (15) refusing to let Farid Gauthier work on February 27, 2002; and (16) Magid's statements to Carmen Dyer. In addition, no exceptions were filed to the judge's recommendations to overrule Objections 2, 4, 10, 12, and 15 or to his disposition of unit placement issues.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In crediting certain witnesses who were current employees, the judge stated that their testimony was "inherently" credible or reliable because they were testifying against the interests of their Employer. While Chairman Battista and Member Schaumber adopt the judge's credibility resolutions, they believe that this formulation is somewhat overstated. The principle is that "the testimony of current employees which contra-

and to adopt the recommended Order as modified and set forth in full below.⁴

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining a rule denying off-duty employees access to "the facility" unless visiting residents, clients, or conducting official business. We adopt the judge's finding of a violation for the reasons stated by him.⁵

2. In agreeing with the judge that a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is not warranted in this case, we do not necessarily adopt his entire rationale. We do, however, agree with the judge that the coercive effects of the Respondent's unlawful conduct can be satisfactorily mitigated, and a fair rerun election ensured, by traditional Board remedies in conjunction with the special remedies the judge has

dicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries*, 316 NLRB 745 (1995).

³ Chairman Battista and Member Schaumber agree with the judge and their colleague that Carl Glickman, the Respondent's chairman of the board, unlawfully threatened employees with closure and job loss in speeches given in April 2002. Accordingly, the Chairman and Member Schaumber find it unnecessary to pass on the judge's findings that the Respondent also threatened closure and job loss in posters and leaflets displayed and distributed in March and April 2002 and through statements by President and Chief Executive Officer Magid in October and November 2001. In their view, these additional findings of a violation would be cumulative and would not affect the remedy.

In addition, Member Schaumber does not agree with his colleagues or the judge that the Respondent unlawfully created the impression of surveillance or engaged in actual surveillance of employees' protected activities. In his view, the record does not establish that the Respondent's observations of employees Williams, Gauthier, and Thompson during the activities in question rose to the level of actual or implied surveillance. Thus, Member Schaumber would reverse the judge's findings that the Respondent created the impression of surveillance in connection with incidents involving (1) Tawana Williams on March 5, 2002, and (2) Farid Gauthier on March 26, 2002, and that the Respondent engaged in actual surveillance in connection with an incident involving Artarene Thompson on April 5, 2002.

Member Walsh would find that the Respondent violated Sec. 8(a)(3) when it suspended Gauthier. In Member Walsh's view, the evidence and analysis that support the judge's finding that the Respondent violated Sec. 8(a)(3) when it discharged Gauthier also support the conclusion that the suspension was unlawful.

⁴ We have modified the judge's recommended Order to conform to the violations found and have substituted a new notice that reflects these changes.

⁵ Chairman Battista and Member Schaumber acknowledge *Tri-County Medical Center*, 222 NLRB 1089 (1976), as controlling precedent in adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by maintaining this rule. The Chairman notes that, under *Tri-County*, supra, a no-access rule can be valid if it is justified by business reasons. In the instant case, the Respondent has not given a justification for its rule.

recommended. Thus, we adopt his recommended remedy and direct a second election.⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, The Jewish Home for the Elderly of Fairfield County, Fairfield, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rules that prohibit employees from engaging in protected solicitation during nonworktime in nonimmediate patient care areas or that prohibit employees from engaging in protected distribution during nonworktime and in nonwork areas that are not immediate patient care areas.

(b) Discriminatorily denying off-duty employees access to the cafeteria.

(c) Maintaining any rules that deny off-duty employees access to the outside nonwork areas of the facility.

(d) Maintaining any rules that prohibit employees from discussing their wages, benefits, or other terms and conditions of employment.

(e) Telling employees that they may not talk about the Union during working time while permitting employees to discuss other nonwork-related subjects during working time.

(f) Engaging in actual surveillance of employees' union and other protected concerted activities or, by other acts, creating the impression among employees that these activities are under surveillance.

(g) Providing assistance to, or otherwise encouraging, employees to revoke signed union authorization cards.

(h) Coercively interrogating any employee about union membership, activities, or support.

(i) Threatening employees with closure of the facility, job loss, or other adverse consequences if they choose to be represented by a union for purposes of collective bargaining.

(j) Granting employees wage increases or promising them increased wages and improved working conditions to discourage them from selecting a union to be their collective-bargaining representative.

⁶ In adopting the special remedies recommended by the judge, Chairman Battista notes that the Respondent did not except to or make any arguments against the imposition of these special remedies.

Member Walsh agrees with the General Counsel's contention in his exceptions that a *Gissel* bargaining order is necessary to remedy the Respondent's serious and pervasive unfair labor practices. However, in the absence of a majority to issue such an order, Member Walsh joins his colleagues in adopting the special remedies recommended by the judge.

(k) Requiring employees to engage in antiunion activities.

(l) Imposing more onerous working conditions on, denying recommendations for, discharging, or otherwise discriminating against employees for supporting New England Health Care Employees Union, District 1199, SEIU, AFL-CIO, or any other union.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rules prohibiting employees from engaging in the solicitation or distribution of literature "in resident, client or child care areas of the home at any time"; denying off-duty employees access to outside nonwork areas of the home; and prohibiting employees from talking about the Union or discussing their wages, benefits, and other terms and conditions of employment; remove these rules from the employee handbook and personnel policies; and inform employees in writing that these rules are no longer in effect.

(b) Make the union observers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, offer Farid Gauthier and Ebonie Stewart full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Gauthier and Stewart whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Gauthier and Stewart in writing that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Fairfield, Connecticut, copies of the at-

tached notice marked "Appendix B."⁷ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall be posted in English, Spanish, Portuguese, and Haitian Creole. The notice shall also be read in the presence of all unit employees by Carl Glickman or the current chairman of the Respondent's board of directors if Glickman no longer holds that position, and shall also be read in Spanish, Portuguese, and Haitian Creole by interpreters. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2001.

(h) Within 14 days from the date of this Order, supply the Union with the names and current addresses of unit employees, updated every 6 months for a period of 2 years or until a certification after a fair election has issued.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election in Case 34-RC-1947 is set aside and that this case is remanded to the Regional Director for Region 34 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain rules that prohibit you from engaging in protected solicitation during nonwork time in nonimmediate patient care areas or that prohibit you from engaging in protected distribution during nonwork time and in nonwork areas that are not immediate patient care areas.

WE WILL NOT discriminatorily deny off-duty employees access to the cafeteria.

WE WILL NOT maintain rules that deny off-duty employees access to the outside nonwork areas of the facility.

WE WILL NOT maintain rules that prohibit you from discussing your wages, benefits, or other terms and conditions of employment.

WE WILL NOT tell you that you may not talk about the Union during working time while permitting you to discuss other nonwork-related subjects during working time.

WE WILL NOT engage in surveillance of your union and protected concerted activities or engage in other conduct that makes it appear that we are engaging in such surveillance.

WE WILL NOT offer to assist you, or otherwise encourage you, to revoke union authorization cards that you have signed.

WE WILL NOT ask you about your union membership, activities, or support.

WE WILL NOT threaten you that the facility will close, or that you will lose your job if you vote for the Union.

WE WILL NOT give you wage increases or promise you increased wages and better working conditions to discourage you from voting for the Union.

WE WILL NOT require you to engage in antiunion activities, such as handing out flyers and leaflets opposing the Union.

WE WILL NOT impose more onerous working conditions if you join or support the Union.

WE WILL NOT refuse to give you a recommendation or reference because you choose to join or support the Union.

WE WILL NOT discharge you, or otherwise discriminate against you, if you join or support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights as set forth above.

WE WILL rescind our rules that prohibit you from soliciting or distributing literature "in resident client or child care areas of the home at any time"; that deny you access to the outside nonwork areas of the home when you are off-duty; and that prohibit you from talking about the Union or discussing your wages, benefits, and other terms and conditions of employment; and WE WILL remove these rules from our employee handbook and personnel policies.

WE WILL make the union observers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Farid Gauthier and Ebonie Stewart full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Gauthier and Stewart whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Gauthier and Stewart, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, supply the Union with an updated list of our employees' names and addresses.

THE JEWISH HOME FOR THE ELDERLY OF
FAIRFIELD COUNTY

Thomas E. Quigley and Robert M. Cook, Esqs., for the General Counsel.

Thomas R. Gibbons and Edward V. Jeffrey, Esqs. (Jackson Lewis LLP), of Hartford, Connecticut, for the Respondent.

Kevin A. Creane, Esq., of Milford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case, involving numerous alleged unfair labor practices committed during an unsuccessful 6-month long union organizational drive, was tried in Hartford, Connecticut, over 16 days between November 13, 2002, and February 11, 2003. New England Health Care Employees Union, District 1199, SEIU, AFL-CIO (the Union) filed the initial charge in Case 34-CA-9920 on November 15, 2001. That charge was amended six times between January 17 and August 30, 2002.¹ The Union filed and amended the remaining charges in this case on various dates between March 28 and July 8. On August 30, an order consolidating cases, consolidated complaint and notice of hearing issued, based on these charges. The General Counsel amended the complaint on October 28 before the hearing opened, and again at the hearing. On September 16, the Respondent filed its answer to the complaint. The Respondent also filed an answer to the amendment to the complaint on November 8 and answered the further amendments to the complaint on the record at the hearing. On November 11, the Respondent amended its answer to raise an additional affirmative defense.

The consolidated complaint, as amended, alleges numerous independent violations of Section 8(a)(1) of the Act, allegedly committed by a number of supervisors and agents of the Respondent, between October 2001 and April 10, 2002. The General Counsel alleges, inter alia, that the Respondent engaged in actual, and created the impression of, surveillance of its employees' protected activities; promulgated and/or maintained and enforced various rules allegedly interfering with employees' Section 7 rights; solicited employees to repudiate the Union and revoke union authorization cards they had signed; granted and/or promised wage increases and other benefits; threatened closure of the facility and job loss through posters and speeches; and made other statements that were alleged to be threatening or otherwise violative of the Act. The consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to allow union activist Farid Gauthier to work on February 27, by suspending Gauthier on March 27, and terminating him on April 10; by imposing more onerous working conditions on Juan Ayala since February 28 and by refusing to give Ayala a recommendation on March 15; by terminating Misty Hinds, Carmen Dyer, and Ebonie Stewart on March 13, April 10, and July 1, respectively; and by denying the Union's observers the right to work on the day of the Board-conducted representation election while allowing its own observers to work. The General Counsel alleges that the above unfair labor practices, if proven, are sufficiently serious and pervasive to require the issuance of a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The Respondent, by its answer as amended, has denied the commission of any unfair labor practices and has asserted that the actions taken against the alleged discriminatees were motivated by legitimate, nondiscriminatory reasons and would have

¹ All dates are in 2002, unless otherwise indicated.

occurred even in the absence of union activity. The Respondent also denied that the unit for which a bargaining order is sought is an appropriate unit under Section 9(a) of the Act, that the Union ever achieved majority support and that a *Gissel* bargaining order is appropriate in this case.²

By Order dated October 30, the General Counsel consolidated the unfair labor practice complaint with objections filed by the Union in Case 34-RC-1947. The Union filed its petition in that case on March 1, seeking to represent the Respondent's service and maintenance employees. Pursuant to a stipulated election agreement dated March 11, an election was conducted at the Respondent's facility on April 11. The tally of ballots prepared after the election and served on the parties revealed that a majority of the valid votes counted plus challenged ballots were not cast for the Union.³ On April 18, the Union filed timely objections to conduct affecting the results of the election. On October 7 the Union withdrew two of the objections. The Board's Regional Director issued a Report on Objections on October 30, finding that the Union's Objections 1-8, 13, and 16 were identical or similar to allegations in the consolidated complaint and that Objections 9, 10, 12, and 15 raised substantial and material issues of fact, including but not limited to issues of credibility, that may best be resolved on the basis of record testimony at a hearing.⁴

These latter objections allege the following:⁵

9. On both April 10th and April 11th the Employer organized, allowed and paid eligible voters, at least some of whom were on duty at the time, to picket the entrance of the facility holding "Vote No" and other signs with various antiunion slogans.

10. During the critical pre-election period, Employer agents, supporters, or others acting in concert with them

bribed or otherwise attempt to illicitly influence the vote of eligible voters, as evidence by, but not limited to, offering to assist at least one employee in his attempt to obtain a "green card" from INS and generating free publicity for the musical band of two (2) other employees.

12. During the critical preelection period, the Employer promoted three (3) former union supporters into leadership positions for the purpose of influencing their vote in the election and assisting management in conducting its antiunion campaign.

15. During the critical preelection period, management consultants, in the course of campaigning against the Union in their capacity as agents of the Employer, misrepresented to employees that they were agents of the National Labor Relations Board and disinterested parties to the election. The consultants reinforced their sham claim that they were agents of the Board by distributing Board issued material to eligible voters.

During the course of the hearing, the General Counsel and the Charging Party Union called 16 witnesses and the Respondent called 46 witnesses.⁶ Numerous documents were submitted into evidence by the parties. On April 11, 2003, the General Counsel, the Charging Party, and the Respondent submitted briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a skilled nursing home, providing inpatient medical and professional healthcare services at its facility in Fairfield, Connecticut. The Respondent, in conducting its operations, annually derives gross revenues in excess of \$100,000 and purchases and receives at its facility goods valued in excess of \$50,000 directly from points outside the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health-care institution within the meaning of Section 2(14) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Respondent operates a 360-bed nursing home on 15.6 acres in Fairfield, Connecticut, serving elderly residents, individuals undergoing rehabilitation following discharge from a hospital, and Alzheimer's patients. The Respondent's facility occupies 211,000 square feet in three main interconnected buildings, i.e., the Tandet, Bennett, and Kuriansky Pavilions. Also located on the Respondent's grounds are four houses, one of which is used as a childcare center, and a large parking lot. The main entrance to the facility is a long driveway up a steep hill. During the period from September 2001 through April

² The Respondent's answer also raised the issue of timeliness under Sec. 10(b) of the Act and claimed that the underlying unfair labor practice charges did not support the allegations of the consolidated complaint. Neither during the course of the hearing, nor in its brief, has the Respondent specified which allegations should fail on these grounds. Because the Respondent has essentially abandoned this affirmative defense, I will not address it in my decision.

³ The tally indicates that there were approximately 396 eligible voters. Of the 389 votes cast, the Union received 146 votes, 213 votes were cast against representation, and 30 ballots were challenged. The challenged ballots were not determinative.

⁴ The Respondent, in the amendment to its answer filed on November 11, asserted that the administrative law judge lacked jurisdiction to consider the *Gissel* bargaining order issue because the Board had not ruled on exceptions it intended to file to the Regional Director's Report on Objections, citing *Irving Air Chute*, 149 NLRB 627 (1964). Because the time for filing exceptions to the Report had not yet expired when the Respondent raised the issue, I reserved ruling on this defense until I made my decision here. The Respondent never advised me whether it in fact filed any exceptions to the Report on Objections or, if it did, whether the Board had ruled on them. The Respondent also did not address this affirmative defense in its posthearing brief. I shall assume, based on the Respondent's failure to press this issue, that the Board has denied any exceptions that may have been filed and that the issues raised by the objections are properly before me, including the issue of the appropriateness of a bargaining order.

⁵ The Union's objections are set forth in their entirety in app. A.

⁶ About half of the Respondent's witnesses were card signers whose testimony was offered to negate the validity of their signatures.

2002, the Respondent employed approximately 400 individuals in service and maintenance classifications and an undisclosed number of employees in other positions, including managers, supervisors, nurses, and other healthcare professionals. Dennis J. Magid was the Respondent's president and chief executive officer during this period. Magid had been employed by the Respondent since 1972, before the facility even opened. He was no longer employed as of the date of the hearing, having retired on September 30. Reporting to Magid were three vice presidents: Michael Silverman, the vice president of operations; Alyssa Rotella-Soderberg, vice president of health services and administrator; and Steve Kramer, vice president of business and finance. The vice presidents had operational responsibility for various departments and, along with Magid and the director of the nonprofit JHE foundation, comprised the Respondent's executive committee. Magid was responsible to the board of directors, which was chaired at the time by Carl Glickman, whose mother had been a resident of the facility for many years.

The Respondent's employees have never been represented by a union. There was an organizational campaign, conducted by the United Food & Commercial Workers Union, in 1999. The Charging Party intervened in an election that was conducted by the Board at the end of that campaign, in September 1999. An overwhelming majority of employees voted against representation by either union at that time. About 2 years later, the Charging Party Union commenced another organizational drive when Tawana Williams, a certified nursing assistant (CNA) at the Respondent's facility, contacted the Union. Williams began holding informal meetings at her home in September 2001. The first union authorization cards were signed on September 27, 2001. By October, the Union was regularly handing out flyers at the bottom of the driveway leading into the Respondent's facility. Employee organizers, including Williams, Gauthier, Stewart, and Artarene Thompson, began soliciting employees to sign authorization cards in late September early October 2001. Some of these solicitations occurred on the Respondent's premises, particularly in the cafeteria and other locations where employees took their breaks. By the time the Union filed its petition, on March 1, it had collected 237 signed authorization cards.

The record reveals that the Union not only campaigned among the Respondent's employees but also enlisted the aid of religious and community leaders in an effort to convince the Respondent to recognize the Union without going through the Board's election processes. On February 27, the Union held a "community election," supervised by some of these individuals, at a commuter parking lot near the Respondent's facility. The results of that election were 196 in favor of representation by the Union and 6 opposed. On March 1, union organizers and employees marched on the Respondent's administration demanding recognition based on the results of the community election. The Respondent declined and the Union filed the Petition that became the subject of this proceeding.

It is undisputed that the Respondent learned of the Union's organizing campaign soon after it started and reacted quickly. By early October 2001, the Respondent had hired attorneys to represent the Respondent in the campaign and had begun train-

ing its supervisors how to respond to employees' inquiries regarding the Union. There is no dispute that the supervisors were also trained to be vigilant regarding employee organizing efforts and to report what they observed to management. In October 2001, the Respondent also began handing out literature and holding meetings with the employees to communicate the Respondent's position.⁷ There is no dispute that Magid, the Respondent's president, conducted several of these meetings within the first month of the campaign. There is also no dispute that some of the literature distributed to employees early in the campaign provided them with information regarding revocation of union authorization cards. The Respondent's communications with employees, through literature, meetings, and one-to-one contacts between supervisors and employees, intensified after the petition was filed, leading up to the date of the election. The Respondent enlisted the chairman of its board of directors, Glickman, to speak to the employees shortly before the election, urging them to vote against union representation. One of the significant events preceding the election was a "Vote No" rally conducted by a number of the Respondent's employees at the bottom of the hill on the day before and the day of the election.

It is clear from the record that both the Union and the Respondent campaigned vigorously to win the hearts and minds of the employees from October 2001 until the election on April 11. As noted above, the Board conducted an election on April 11 at which only 146 employees voted for the Union and 213 employees voted against representation, a significant reversal from the 237 cards obtained before the petition was filed. The long campaign generated a multitude of unfair labor practice charges and a request for a remedial bargaining order, which have been consolidated into this proceeding. The General Counsel and the Charging Party contend that these unfair labor practices caused the turnaround in employee support for the Union. They seek a remedial bargaining order to cure the effects of the unfair labor practices and to restore the Union's status as the designated representative of an uncoerced majority of the Respondent's employees. The Respondent counters that, regardless of any unfair labor practices found, the Union never represented an uncoerced majority of employees and that the results of the election reflect the true sentiments of the employees.

The alleged unfair labor practices can be grouped into major categories, such as surveillance, rules, threats, promises, and the like. Most turn on resolutions of credibility. As to be expected with the passage of time and the different perspectives of the witnesses, there are many variations among the witnesses on both sides in the testimony regarding common events. In evaluating these allegations, I have considered the demeanor of the witnesses, the consistency of each witness' testimony, internally and with other evidence in the record, and the reasonable probabilities that events occurred as described. The resolution of these credibility issues is not an exact science, but I

⁷ Magid succinctly summarized the Respondent's message in his testimony: "that we were fully capable of resolving employees' problems and moving forward to higher levels of care, that a union was not necessary in this process and could impair our ability to provide that."

have tried in each instance to determine what is most likely to have occurred in the circumstances. It also bears repeating the well-recognized maxim that it is possible to believe a witness as to part of his or her testimony even while discrediting the witness on other aspects of the testimony. See *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). With respect to those allegations involving undisputed facts, the parties disagree as to the legal consequences. In these situations, I have applied whatever current test the Board has applied to such allegations to reach my conclusion.

B. The 8(a)(1) Allegations

1. Rules and their application

a. The rules

Paragraph 20 of the consolidated complaint, as amended at the hearing on December 13, alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining the following rules since on or about October 1, 2001:

a. Employees may not solicit or distribute literature in resident, client or childcare areas of the home at any time.

b. Employees shall leave the Home promptly after their scheduled work period ends. With the exception of visiting residents, clients, or official facility business, off-duty employees are not allowed access to the facility. Off-duty employees who visit residents are subject to the rules and regulations applicable to non-employee visitors.

c. The Home recognizes and respects the privacy and confidentiality of employee records. The Home expects that each employee *will not disclose or share pertinent private information*. This applies to wages, merit increases, paychecks, performance evaluations, health or medical conditions, insurance or pension information or any other benefit. At your request and with our written approval, the Human Resources Department will release certain confidential information needed to assist you in a financial matter. [Emphasis in original.]

The first two rules are set forth at pages 19 and 20 of the Respondent's employee handbook, under the heading "Solicitation and Distribution of Literature." They are two of five rules preceded by an introductory paragraph noting the Respondent's primary concern is resident care and justifying the rules as necessary to "prevent disruption or interference with the Home's operations." The other three solicitation/distribution rules in the handbook are not challenged by the General Counsel and appear lawful on their face. The third rule alleged as unlawful, regarding confidentiality of employee records, is contained in the Respondent's personnel policies. In addition, all new employees are required to sign a confidentiality agreement that incorporates this rule. The Respondent did not dispute that it maintained these rules during the organizational campaign, averring only that the rules predated October 1. The Respondent denied that the mere maintenance of these rules violated the Act.

Complaint paragraph 21 alleges that the Respondent violated Section 8(a)(1), on or about November 27, 2001, by issuing a corporate compliance program handbook that contained the following rule:

Employees or agents shall not use or reveal any confidential information concerning JHE [the Respondent], or use for personal gain, any confidential information obtained as an employee or agent of JHE.

The Respondent admitted issuing the corporate compliance program handbook containing the cited rule on November 27, 2001. The cited rule was only one of a number of policies promulgated at that time to ensure that the Respondent and its employees complied with the many laws affecting the operation of its nursing home and establishing a mechanism to address instances of noncompliance. The Respondent also denied that the promulgation of this rule violated the Act.

(i) The solicitation/distribution rule

The General Counsel concedes that the Respondent, as a healthcare facility, has the right to restrict employee solicitation and distribution in immediate patient care areas even during nonworking time. See *Beth Israel Hospital*, 437 U.S. 483 (1978). The General Counsel contends that the first rule cited above is unlawful because it extends to areas of the facility that are not "immediate patient care areas," and that this factor and the use of the phrase "at any time" make the rule overly broad. The Respondent argues that the same logic that permits prohibition of protected employee activity in immediate patient care areas should apply to the Respondent's restriction of such activity in "resident, client and child care areas" of its facility. Neither in its brief, nor at the hearing, did the Respondent indicate which areas outside of resident floors, other than the adult day-care and childcare centers, would be covered by the prohibition. The Respondent also offered no evidence as to the likelihood that employee solicitation and distribution in these nondescript "resident, client or child-care areas of the home" would disrupt patient care.

In *Our Way, Inc.*, 268 NLRB 394 (1983), the Board held that rules prohibiting employee solicitation and distribution of literature during "working time" are presumptively lawful even without further definition. Conversely, rules prohibiting solicitation at "any time" and distribution in nonwork areas at "any time" are presumptively unlawful. Such rules will be found to violate the Act in the absence of evidence that the employer has clarified or defined the restriction to limit its application to times when employees are scheduled to be working at their assigned duties. *Ichikoh Mfg.*, 312 NLRB 1022 (1993). Accord: *Cardinal Home Products*, 338 NLRB 1004 (2003). In a healthcare facility like the Respondent, the Board recognizes the importance of insulating patients from the potentially disruptive impact of employee solicitation and distribution by permitting a ban on such activity in "immediate patient care areas" at any time. *Brockton Hospital*, 333 NLRB 1367 (2001), *enfd.* in relevant part 294 F.3d 100 (D.C. Cir. 2002), *cert. denied* 537 U.S. 1105 (2003). See also *Beth Israel Hospital*, *supra*; *Baptist Hospital*, 442 U.S. 773, 786-787 (1979).

I am unaware of a case, and the Respondent has not cited one, in which a childcare center like the one operated by the Respondent in a house separate from its primary patient/resident care buildings has been found to be an "immediate patient care area." The children who attend the Respon-

dent's childcare center are neither patients nor residents. The care they receive there is not healthcare. Although unit employees and employees in classifications whose status is disputed work in the center, there is little contact with the residents who are the focus of the Respondent's healthcare services. To the extent the Respondent's rule applies to employee solicitation during nonworking time in the childcare center, it is overly broad on its face.

The Respondent's rule does not define "resident care" or "client care" area. Because there is some evidence, to be discussed infra, that the Respondent has sought to restrict employee solicitation during breaks in areas such as employee lounges and the nurses' station on resident floors, it appears that the rule goes beyond what the Board and the courts have recognized as "immediate patient care" areas. Having chosen to use ambiguous terms rather than the phrase "immediate patient care area," it was incumbent on the Respondent to provide some guidance to its employees as to the extent of the restriction. See *Norris/O'Bannon*, 307 NLRB 1236 (1992). Accordingly, to the extent this rule would prohibit employee solicitation "at any time" in parts of the Respondent's facility that are not involved in immediate patient care, it is overly broad. Similarly, to the extent the rule prohibits the distribution of literature in nonwork areas within "resident and client care areas" of the Home, it is overly broad. Cf. *Hale Nani Rehabilitation & Nursing*, 326 NLRB 335 (1998). Accordingly, I find that the Respondent has violated the Act, as alleged, by maintaining this rule during the period covered by the complaint. *Brockton Hospital*, supra; *Eastern Maine Medical Center*, 253 NLRB 224, 225 (1980). Accord: *Cooper Health System*, 327 NLRB 1159 (1999).

(ii) The access rule

There is no dispute that the Respondent has maintained a rule denying its off-duty employees access to "the facility" unless they are visiting a resident, client, or conducting official facility business. The Board held, in *Tri-County Medical Center*, that such a "no-access" rule is valid

only if it (1) limits access solely with respect to the interior of the plant [or] other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

222 NLRB 1089 (1976). Accord: *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003). The General Counsel contends that the Respondent's no-access rule is unlawful on its face because it does not define the term "facility" as being limited to the interior of the plant or other working areas. According to the General Counsel, employees could reasonably interpret this rule as prohibiting them from solicitation and distribution in the parking lot and other nonworking areas outside the building. The Respondent contends that the rule is clear on its face and when read in the context of another rule that prohibits nonemployees from "trespassing, solicitation, or distribution of

materials on the Home's premises at any time." According to the Respondent, employees would clearly understand the difference between "facility" and "premises," with the first word being limited to the buildings and the latter including the parking lot and other external areas.

In *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), the Board found unlawful a no-access rule that required employees to leave the "premises" immediately after completion of their shift and not return until their next scheduled shift. The Board rejected the Respondent's argument there that the rule was not intended to cover the parking lot and other areas outside the hotel. As the Board stated:

The rule contains no explicit exclusion of such areas, and therefore employees would reasonably read the rule as covering those areas. Thus, even if the Respondent did not intend the rule to reach those areas, the intent was not clearly communicated to the employees. Further, even if the rule could be considered ambiguous, any ambiguity in the rule must be construed against the Respondent as the promulgator of the rule.

326 NLRB supra, at 828. In *Baptist Medical Center Health Midwest*, 338 NLRB 346 (2002), the Board adopted the administrative law judge's finding that a rule prohibiting employees from returning to the "facility" after their shift was unlawful because it was unclear whether that term applied strictly to the interior portion of the hospital or included outside areas. For a no-access rule to be valid, it must be clear on its face that it is limited to the "interior of the plant or other working areas." Id. In that case the Board also adopted the judge's finding that discipline issued to two off-duty employees under this rule for soliciting at a nurses' station was unlawful. Id. 352. The Board has also recently reaffirmed the principal that off-duty employees have the right, under Section 7 of the Act, to engage in union solicitation and distribution in nonwork areas of their employer's property. See *Postal Service*, 339 NLRB 1175 (2003); *Golub Corp.*, 338 NLRB 515 (2002).

Applying the above precedent to the facts here, I find that the Respondent's rule is unlawful under the *Tri-County* standard. The term "facility" is not so clear on its face that employees would understand that they were permitted to engage in protected activity in the parking lot or in other nonworking areas outside the building. Evidence in the record, to be discussed infra, shows that the Respondent did not clarify the rule when given a chance to do so on February 15, when it evicted from the cafeteria three off-duty employees who were engaged in union solicitation and distribution. According to the General Counsel's witnesses, they were told by the Respondent's vice president, Silverman, that they could not engage in such activity on the Respondent's "premises" if they were off-duty. I do not agree with the Respondent's contention that the terms "facility" and "premises" are so distinct that the ordinary employee would understand the true extent of the Respondent's prohibition. Accordingly, I find, as alleged in the complaint, that the no-access rule appearing in the Respondent's employee handbook was overly broad in violation of Section 8(a)(1) of the Act.

(iii) Confidentiality rules

It is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the Act. *Flamingo Hilton Laughlin*, 330 NLRB 287, 292 (1999); *Koronis Parts*, 324 NLRB 675, 686, 694 (1997); *Vanguard Tours*, 300 NLRB 250, 264 (1990), enfd. in relevant part 981 F.2d 62 (2d Cir. 1992); *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). The Respondent's confidentiality rule contained in its personnel policies and incorporated in the confidentiality agreement signed by new employees, on its face, includes wages, merit increases, evaluations, paychecks, and other information that employees have a right under the Act to discuss with their co-workers, union organizers, or government officials. The rule is thus unlawful on its face.

The Respondent does not seriously challenge this finding. The Respondent argues instead that no violation should be found because the rule predates the union organizing drive and there is no evidence it has ever been enforced. The fact that the rule predated the campaign is immaterial because there is no dispute that it was maintained during the campaign. The Board has held that the mere maintenance of such rules is unlawful because they tend to inhibit employees from engaging in otherwise protected activity. *IRIS U.S.A.*, 336 NLRB 1013 (2001). See also *Lafayette Park Hotel*, 336 NLRB at 825. Recognizing this precedent, the Respondent argues that the Board should overrule it, essentially requiring that a rule prohibiting protected activity be enforced before a violation can be found. I will leave that determination to the Board. Following precedent, I find that this confidentiality rule violates Section 8(a)(1) of the Act, as alleged.

The confidentiality rule contained in the corporate compliance program handbook promulgated on November 27, 2001, is a different story. That rule does not expressly mention wages, benefits, or other employee terms and conditions as being included in the realm of "confidential information concerning JHE" that employees are prohibited from divulging or using for personal gain. When faced with a similar rule in *Lafayette Park Hotel*, supra, the Board found that employees would not reasonably read such a rule as prohibiting discussion of wages and working conditions with other employees. See also *Medaone of Greater Florida, Inc.*, supra; *Super K-Mart*, 330 NLRB 263 (1999). The General Counsel contends that the Respondent's employees would interpret this rule to prohibit protected discussion because of the existence of the older rule explicitly prohibiting such discussions. I do not agree. The rule contained in the corporate compliance handbook was adopted for a different purpose, which is explained in the introductory portions of the handbook. Reading this rule in the context of the rest of that handbook would clarify any ambiguity that existed because of the prior rule. I find that this rule is not unlawful and shall recommend dismissal of paragraph 21 of the complaint.

b. Application of the rules

Several complaint allegations involve claims that the Respondent, through several admitted supervisors and agents, unlawfully attempted to enforce these rules against employees

who were engaged in protected union activities. In most instances, the complaint alleges that the Respondent's agents went beyond any permissible restriction on solicitation and distribution by banning employees from even talking about the Union at work. Most of these allegations turn on credibility resolutions, with the Respondent calling the alleged supervisors to contradict the testimony of the General Counsel's witnesses. One of the last incidents alleged as unlawful in this category of offenses was the February 15 eviction of three of the leading employee advocates for the Union from the cafeteria under the Respondent's no-access rule, found unlawful above. Because I have already found that rule unlawful, the Respondent's enforcement of it on February 15 would violate the Act even under the version of events offered by the Respondent's witnesses. See *Baptist Medical Center*, supra, 352. I will discuss each of these allegations, starting with those allegedly committed by the highest management officials and proceeding down the chain of command.

Paragraph 12(b) of the complaint alleges that the Respondent's president, Magid, on an unspecified date in October 2001, prohibited employees from discussing the union at any time at the Respondent's facility. From the testimony at the hearing, it appears this prohibition is alleged to have occurred at one of the group meetings Magid admittedly conducted in October to inform the employees of the Respondent's position on the Union. Of all the witnesses called by the General Counsel and the Charging Party, only one, Williams, testified to such a statement by Magid.⁸ Williams testified that this statement was made at the annual budget meeting, in the first week of October, after Magid had finished talking about the budget. She recalled that Magid brought up the subject of the Union, telling the employees that the Union was trying to get into the facility again and that the Respondent was going to do everything to keep the Union out. She testified that Magid told the employees that the Respondent knew about the union activities going on around the house. She recalled that he told employees at this meeting that they "cannot discuss Union while on duty to other employees or hand out leaflets or anything while on duty." According to Williams, Rotella-Soderberg, the Respondent's administrator was also at this meeting along with an undisclosed number of employees from nursing, housekeeping, and dietary.

Magid admitted holding two series of meetings with employees regarding the union campaign in October, one during the first week of the month and the second on or about October 29. He also acknowledged annually meeting with the employees in October, after the budget is typically approved, to inform the employees about the Respondent's financial condition. Magid could not recall if the budget meeting in 2001 was a

⁸ Only three other witnesses testified regarding the meetings at which Magid spoke, Marciana Lozada, Harmenta Needham, and Melissa Quarles. None of them mentioned Magid making any statements at the meetings they attended regarding employees' rights to talk about or solicit for the Union. However, because Magid held a number of meetings, both at the beginning of the campaign and closer to the election, it is not clear whether the meetings described by Lozada, Needham, and Quarles were the same meeting at which Williams heard this statement.

separate meeting or combined with one of his talks about the Union. According to Magid, he utilized a script for both meetings about the Union to avoid saying anything that was illegal. While claiming to have read the scripts verbatim, Magid acknowledged that he was required to speak off the top of his head during question and answer sessions at these meetings. There is no mention of when and where employees may engage in union activity in the script for the meetings Magid gave at the beginning of October. There is a section in the script for the October 29 meeting which is entitled "Workplace Activity." If Magid read this portion of the script, he would have told the employees the following:

Employees are allowed to communicate with other employees about anything they choose when both employees are on their own time and are not in a patient care area. This means non-working time—your breaktime or lunch time.

Employees also have the right to distribute literature to other employees when both employees are on their own time, but only if they are not in a patient care area or any other working area.

Magid did not specifically deny making the statement attributed to him by Williams.

Based on the above evidence, I find that the Respondent, through Magid, did not violate Section 8(a)(1) of the Act in October 2001 as alleged in paragraph 12(b) of the complaint. Even crediting Williams' uncorroborated testimony, at most Magid advised the employees that they should limit their solicitation and distribution activities to times when they were not on duty. This is consistent with the text of the October 29 speech and consistent with Board law on the subject, as discussed above. In particular, there is no evidence that Magid told employees, at this meeting or at any other time, that they could not discuss the Union "at any time at the Respondent's facility." Accordingly, I shall recommend that paragraph 12(b) of the complaint be dismissed.

Williams also testified about another incident that occurred in late October involving Linda DiGangi, the Respondent's assistant director of patient care services and an admitted supervisor. The complaint alleges at paragraph 13 that the Respondent violated Section 8(a)(1) during this encounter by "prohibiting employees from engaging in union activities while at work." According to Williams, she was summoned to DiGangi's office at about 10 a.m. Nursing Supervisor Jeannette Laidlaw was also present in the office. This meeting occurred the same morning that Williams had handed out union leaflets to employees on Tandet East, which was not her unit. Williams did this before the start of her shift. She acknowledged that the employees to whom she gave the leaflets were on duty, even though she herself was not. Tandet East is clearly a work area. Williams testified that DiGangi told her, during the meeting, that Williams had been seen handing out leaflets and talking to other workers on east wing. DiGangi told Williams that she "cannot be soliciting on the job, while on duty." When Williams replied that she was not on duty, DiGangi said, "I don't care how you feel about the Union, you cannot do union activities while on duty." On cross-examination, Williams conceded

that she understood DiGangi's instruction to be that she could not solicit if either she or the person she was soliciting was on duty.

DiGangi testified that she called Williams into her office after receiving reports that she was handing out leaflets on work time. According to DiGangi, Williams denied that she was on work time. When DiGangi asked if the other employees were on duty, Williams said some were, some weren't. DiGangi testified that she then reminded Williams that she can only hand out literature if both she and the other employee are on break. When she finished her remarks, Williams asked, "[I]s that it?" When DiGangi said, "[Y]es," Williams said, "[O]kay" and left the office. It is undisputed that no disciplinary action was taken against Williams as a result of this incident. Both witnesses agree that the meeting was very brief.

I find nothing improper in this event. Williams essentially admitted that she had engaged in unprotected activity by handing out union literature in a patient care area to employees, at least some of whom were on duty. There is no credibility issue here because Williams and DiGangi essentially agree as to what was said in DiGangi's office. DiGangi's statement of the rule regarding distribution is consistent with the Act, as interpreted by the Board. See *Hale Nani Rehabilitation Center*, 326 NLRB 335 (1998). Accordingly, I shall recommend dismissal of this allegation of the complaint as well.

Paragraphs 8(b), (c), and (d) allege that the Respondent violated Section 8(a)(1) through admitted Supervisor Laidlaw, on two occasions, in November and December 2001, when she prohibited employees from talking about the Union while at work. Laidlaw is also alleged, in the latter incident, to have unlawfully limited employees regarding the location of their breaks. Harmenta Needham testified regarding the November allegation and Williams is the witness to the December allegation. Laidlaw testified for the Respondent as to both these allegations.

Needham, who was still employed by the Respondent when she testified at the hearing, testified that Laidlaw told employees in meetings, sometime in the fall 2001, that they "cannot discuss the Union on the job. You have to do it on your own time." Laidlaw acknowledged that Needham was an employee under her supervision but testified that she could not recall having any conversation with Needham about the Union. Laidlaw also testified that she could not recall having a discussion with Needham or any other employee about when they could or could not talk about the Union. I credit Needham's testimony. As a current employee, testifying against the interests of her employer, Needham is inherently credible. *Flexsteel Industries*, 316 NLRB 745 (1995); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), *enfd.* as modified 308 F.2d 89 (5th Cir. 1962). Laidlaw's admonition amounted to an overly broad "no-talking rule." In the absence of evidence that the Respondent banned all nonwork related topics from employees' on-the-job conversations, I must find that Laidlaw violated the Act in her statement to Needham and other employees who were at the meeting. See *PCC Structural, Inc.*, 330 NLRB 868, 869 (2000); *Frazier Industrial Co.*, 328 NLRB 717 (1999), *enfd.* 213 F.3d 750 (D.C. Cir. 2000); *Emergency One*, 306 NLRB 800 (1992).

Williams testified that, on or about December 6, 2001, after learning that employees were getting a raise, she left her unit and went to Tandet West, another nursing unit, to talk to Artarene Thompson about it. Thompson was another leading union supporter. Williams admitted speaking to Thompson about the raise in the hallway on Tandet West. Williams testified that she was on her lunchbreak at the time. She testified further that, although Thompson was not on a break, she did not appear to be working. Williams then went to Tandet East unit to talk to another employee, Joyce Williams. When she did not find Joyce Williams on her unit, Tawana Williams went to the staff cafeteria to eat her lunch. She found Joyce Williams in the cafeteria, also on her lunch break. According to Tawana Williams, while she was in the cafeteria, she was called to the phone. Angela Bentley, the assistant nurse in charge of her unit, was on the other end of the line. Bentley asked Tawana Williams what she was doing, telling Williams that she had received three phone calls about her, from Magid, Silverman and Laidlaw. Williams told Bentley that she was “visiting” and was now on break in the cafeteria. After this conversation, Tawana Williams finished her break and returned to work. Shortly after returning to her unit, she was called to the nursing office by Laidlaw. The infection control nurse, who has since passed away, was also present when Williams got to Laidlaw’s office. Williams testified that Laidlaw told her that she could not go to the west wing on her break, that she had to go to designated areas, such as the coffee shop, the staff cafeteria or the women’s auxiliary cafeteria. Williams asked if this applied to everybody. According to Williams, Laidlaw replied that is not what she was saying. When Williams asked what was she saying, Laidlaw replied, “[T]he girls on west wing were not on their break.” Williams responded that she did not know that they were not on their break because they were sitting in the hallway. Williams recalled further that Laidlaw told her that the nurse manager on Tandet West, John Stusalitis, is the one who informed Laidlaw that Williams was on the unit talking to the employees.

Laidlaw testified that, on a date she could not recall, someone called her and said that Tawana Williams was on Tandet West, in a patient care area, talking with staff on the unit. Laidlaw admitted calling Williams’ unit and being told that Williams was on her lunchbreak. Laidlaw then called the Tandet West unit and asked if the employees with whom Williams spoke were on break. According to Laidlaw, she was told that the employees had already had their break and were covering for other employees who were at lunch. Laidlaw then called Tawana Williams to the office and asked her what she was doing on Tandet West. Laidlaw admitted telling Williams that she was in an area where she was not supposed to be, talking to employees who were working. Laidlaw also admitted telling Williams that she should take her breaks in the cafeteria, the lounge on the unit, or outside. Laidlaw testified that she could not recall if this was in the same conversation or not. According to Laidlaw, she told Williams this in order to “re-clarify” policy regarding where employees can take breaks after receiving reports that Williams was being seen throughout the building. Laidlaw conceded that Williams was a good CNA, that she had not had any problems with Williams “wandering” be-

fore the union campaign and that there had been other employees who did have a tendency to wander off during the workday. Laidlaw testified that she has spoken to other employees about “wandering” around the facility. Laidlaw also acknowledged that employees were permitted to talk to one another while at work. There is no dispute that no discipline resulted from this incident.

As noted above, a healthcare institution, like the Respondent, is entitled to impose greater restrictions on employee solicitations than would be permitted in other settings. For example, a prohibition on solicitation in immediate patient care areas “at any time” is presumptively lawful, even though the same restriction in another setting would be considered overly broad. See *Brockton Hospital*, 333 NLRB 1367 (2001). The Supreme Court has included corridors outside patients’ rooms within the definition of “immediate patient care area.” *NLRB v. Baptist Hospital*, 442 U.S. 773, 784–786 (1979). Here, although Tawana Williams was on her break when she “visited” Thompson on Tandet West and spoke to her in the hallway, there is no dispute that Thompson was not on break. If Williams’ activity can be characterized as “solicitation,” her visit was not protected and Laidlaw’s statement to her would not be unlawful. As also noted above, an employer, including one in the healthcare business, cannot ban its employees from “talking” about the union if it permits conversation on other topics. I find that Williams’ activity went beyond mere routine work time conversation that is acceptable in a healthcare institution. Williams sought out Thompson, while she was working, to discuss with her the recent announcement regarding the wage increase and its relation to the union campaign.⁹ Although Williams technically did not “solicit” Thompson to do anything, her “campaigning” is the type of activity that should take place when both employees are not supposed to be working and should not take place in an immediate patient care area under the rationale of Board and Court decisions. To the extent that Laidlaw prohibited Williams from campaigning with employees who were working in an immediate patient care area, her statement was lawful. Accordingly, I shall recommend dismissal of paragraph 8(c).

The complaint alleges separately that Laidlaw’s conversation with Williams unlawfully restricted the location where she could take breaks. While it may be true that employees generally had not previously been restricted during their breaks to the cafeterias, lounges, and other locations cited by Laidlaw, her statement must be considered in the context of the incident that led Laidlaw to call Williams into the office. As I have found above, Williams’ meeting with Thompson to discuss the recent wage increase went beyond what is permissible activity in an immediate patient care area. I also note that after first telling Williams she could only take her break in the areas designated, she essentially retracted that prohibition when confronted by

⁹ Williams’ conduct is thus qualitatively different from two employees talking about or “discussing” the Union while they go about performing their duties in their work area. A ban on such conversations would be unlawful because they are no different than workplace conversations among employees about sports, politics, local events of interest, etc., which the Respondent has permitted. See *Wal-Mart Stores*, 340 NLRB 637 (2003).

Williams. Laidlaw then explained “what she was saying” by reference to the activity at issue, i.e., Williams having gone to another patient unit to talk to employees who were supposed to be working. There is no evidence that Williams or any other employee was restrained with respect to where they took their breaks after this conversation. Accordingly, considering the evidence regarding this meeting in its context, I cannot find that the Respondent, through Laidlaw, unlawfully restricted the location of employee breaks as alleged at paragraph 8(d) of the complaint. I shall recommend dismissal of this allegation as well.

Paragraph 16 of the complaint alleges that the Respondent’s admitted supervisors, Julie Wargo and Stusalitis, on separate occasions involving different employees, unlawfully prohibited employees from talking about the Union. Juan Ayala testified regarding the Wargo allegation and Thompson testified regarding the Stusalitis allegation. The Respondent called both supervisors to contradict the testimony of the General Counsel’s witnesses. Resolution of this allegation turns on whether the supervisors in fact prohibited employees from merely talking about the Union, which as found above would be unlawful, or from soliciting other employees during worktime.

Thompson testified that, sometime during the union campaign, most likely after Christmas and during the wintertime, she was sitting in the nurses’ station on her unit, talking with her coworkers about the Union when her supervisor, Stusalitis, told her and her coworkers that they couldn’t talk about the Union unless they were on break. Thompson described the conversation as employees sharing information about their experiences with the Union. She denied that anyone was soliciting people to sign cards during this conversation. According to Thompson, the conversation took place after she and her coworkers had finished their patient care duties and were waiting to transport the residents to lunch. Although Thompson and the others complied with Stusalitis instructions at that time, she acknowledged that she continued to talk about the Union with other employees at work after this incident. It is undisputed that no discipline resulted from this incident. Although Thompson identified by name the other employees with whom she was talking, none were called as witnesses.

Stusalitis admitted talking to Thompson and other CNAs sometime in the winter 2002, before the election. He recalled the conversation taking place in the unit kitchen located behind the nurses’ station. According to Stusalitis, he spoke to the employees because they were speaking loudly, within earshot of the residents, and he observed that there were breakfast trays out that had to be collected. Stusalitis testified he told the employees to “tone it down. You have work to do. If you want to talk about this, take it into the break room.” Stusalitis acknowledged that he was aware that the employees were talking about the Union. Although he recalled other employees being present, he testified that Thompson is the only one he remembered by name because she stood out in his recollection of the event. Stusalitis acknowledged that he and Thompson would often “butt heads” and that he was aware that she was an active union supporter. Stusalitis denied telling Thompson or the other employees that they could only talk about the Union on break. According to Stusalitis, he spoke to them because they

were loud and residents were close by. He described this incident as consistent with his practice of asking employees to take their conversations into the breakroom when they become loud enough for residents to hear. During her cross-examination by counsel for the Respondent, Thompson had denied Stusalitis’ characterization of the event.

Thompson was still employed by the Respondent at the time of the hearing. Because she was testifying against the interest of her current employer, her testimony is inherently credible. I note also that Stusalitis recalled this conversation with a great deal of detail even though he took no notes or otherwise memorialized the event that took place about a year before his testimony. Stusalitis’ attentiveness to the fact that the employees were talking about the Union is also consistent with the training the Respondent’s supervisors had received to be vigilant for employees’ engaging in union activities at the Home. Stusalitis went beyond merely telling the employees that they could not solicit for the Union. He prohibited them from even talking about the Union. I thus find that the Respondent violated the Act, as alleged in paragraph 16(b) of the complaint.

Juan Ayala testified that, early in March, while wrapping silverware in the kitchen, a coworker asked him a question about the upcoming union election. According to Ayala, the employee wanted to know if she had to vote in the election. Ayala told her that it was just like the presidential election, it was her choice whether to vote or not. Soon thereafter, Julie Wargo, one of the Respondent’s food service supervisors, called Ayala into the office and told him he had to stop talking about the Union. According to Ayala, Wargo told him if he wanted to talk about the Union, he had to do it on break. Ayala denied that he was talking about the Union, telling Wargo that he was merely answering a question. Wargo did not respond to this and the conversation ended. No discipline resulted from this event.

Wargo recalled having a conversation with Ayala about “union conversations” sometime between January and the April election. According to Wargo, she spoke to Ayala because another employee, Linda Disabella, complained to her that Ayala was talking about the Union while she was trying to get her work done. Wargo testified that she told Ayala, “[Y]ou need to talk about the Union on your own time, you’re interfering with other people who are trying to do their work.” According to Wargo, Ayala said nothing and turned and left the office. Wargo conceded that Ayala has worked for the Respondent a number of years, that he is a good employee, quiet, who has never caused any problems. Nevertheless, she called him in based on one employee’s complaint that he was “interrupting her work.” Wargo also acknowledged that employees are permitted to talk about nonwork subjects while they are working as long as they don’t interfere with the work of others.

I credit Ayala’s version of this incident, i.e., that Wargo told him he had to stop talking about the Union, that he could only talk about the Union on break. This is consistent with what Wargo testified was her understanding of the rules. Her testimony about another employee complaining that Ayala was interfering with her work appeared to be nothing more than a posthoc rationalization for her conversation with Ayala. From her own description of him, it would be out of character for

Ayala to have interfered with another employee's work. In any event, Ayala's conduct did not amount to "solicitation" as the Board has defined it. See *Wal-Mart Stores*, supra. As with the above-described statements by Laidlaw and Stusalitis, Wargo's statement to Ayala in early March amounted to an overly broad prohibition of union talk in violation of Section 8(a)(1) of the Act. Accordingly, I find that the Respondent violated Section 8(a)(1) as alleged in paragraph 16(a) of the complaint.

Paragraph 15 of the complaint alleges that the Respondent, through Magid, Silverman, and Kevin Pryor, its director of facility services, violated Section 8(a)(1) of the Act by denying access to its off-duty employees and threatening them with arrest on February 15. As previously noted, there is no dispute that the Respondent evicted Stewart, Gauthier, and Tawana Williams from the cafeteria on that date under the no-access rule that was previously found unlawful. Even assuming the rule was a valid access rule under *Tri-County Medical*, 222 NLRB 1089 (1976), I find that the Respondent's actions that day were unlawful because the evidence clearly establishes that this was a discriminatory application of that rule. The Respondent, in its brief, makes much of apparent discrepancies in the description of this event among the General Counsel's witnesses. Suffice it to say that the Respondent's three witnesses, Magid, Silverman, and Pryor, were also not entirely consistent in their description. It is not necessary for me to determine which is the more credible version because, even as described by the Respondent's witnesses, the Respondent violated the Act.

There is no dispute that Gauthier, Stewart, and Williams came to the Respondent's facility on their day off for the express purpose of handing out union leaflets in the cafeteria. There is no evidence that in doing so they interfered with the Respondent's operations or disturbed any residents or employees. On the contrary, the three off-duty employees took up a position at a table at the back of the cafeteria with their leaflets and essentially waited for employees to come to them to pick up literature. They may have approached a few employees and offered them literature, but there is no contention that their activity was disruptive or confrontational. Within a short time after they arrived, Donna Erickson, a food service supervisor, picked up the phone and called Silverman, the Respondent's vice president. Silverman testified that Erickson told him that there were off-duty employees in the cafeteria handing out literature. Although Silverman did not testify that Erickson told him it was union literature, Magid and Pryor admitted that they knew it was pronoun literature being disseminated in the cafeteria. In fact, Magid explained that is why he, the Respondent's president, decided to go to the cafeteria with Silverman to see what was happening. Pryor testified that he was sitting in Silverman's office when the call from Erickson came in and that Silverman was concerned that it was union flyers that were being distributed.¹⁰ On receiving this report, these three high-

level managers sprung into action and headed straight for the cafeteria where, on confirming with the employees that they were in fact off-duty, Silverman told them they had to leave. Gauthier, Stewart, and Williams quickly complied, gathered up their papers and left the building. Although all three managers testified that they cited the access rules in telling the employees that they had to leave, at least two of them, Pryor and Silverman admitted that they themselves had seen off-duty employees in the cafeteria on other occasions and never even questioned what they were doing there. Silverman testified that he just "assumed" that if an off-duty employee was in the cafeteria they were there for one of the permissible reasons under the rule. Yet he admitted that no issue had ever been made of off-duty employees being in the cafeteria until these three union activists decided to leaflet there on their own time. Thus, a rule that had largely been ignored before February 15 was revived solely in response to the report of off-duty employees engaging in pronoun distribution in the cafeteria.¹¹ The discriminatory application of this rule clearly violated Section 8(a)(1) and I so find.¹²

2. Surveillance and related allegations

Several of the complaint allegations allege that the Respondent engaged in actual surveillance of its employees' union activities, or created that impression among its employees through statements and conduct. To determine whether an employer's statements or actions unlawfully create the impression of surveillance, the Board asks whether the statements or actions at issue would reasonably lead employees to assume that their protected concerted activities had been placed under surveillance. *Ichikoh Mfg.*, 312 NLRB 1022, 1023 (1993); *United Charter Service*, 306 NLRB 150 (1992). Among the factors considered by the Board in performing this analysis is the extent to which the employees have been open about their union activities, whether the activities have been conducted on or off the employer's premises, and the extent of knowledge conveyed by the employer regarding the details of the employees' activities.

Paragraph 7 of the complaint alleges that the Respondent created the impression of surveillance by installing new surveillance cameras at its facility in October 2001. The only evidence offered by the General Counsel in support of this allegation was the testimony of Tawana Williams. Williams testified that, about the second week of October, after Magid had held his first series of meetings with the employees, she noticed surveillance cameras had been installed at all entrances to the building, by the smoking area, which is near the time clocks, and in the Kuriansky elevators. There is no evidence that these

¹⁰ As one example of the inconsistency in the testimony of the Respondent's witnesses, I note that Silverman contradicted Pryor's testimony that Pryor was in his office when he received Erickson's call. According to Silverman, he and Magid picked up Pryor on their way to the cafeteria.

¹¹ I note that, had the three employees distributed union literature in the cafeteria during a lunchbreak on a scheduled workday, they would clearly have been protected by Sec. 7 of the Act under long-settled law and the Respondent could not have evicted them.

¹² Par. 15 of the complaint also alleges that the employees were threatened with arrest. Only one of the General Counsel's witnesses, Williams, testified to such a threat. In the absence of some corroboration from one of the other witnesses who were with her when Pryor allegedly said this, I shall recommend dismissal of this portion of the allegation.

surveillance cameras were being used to record any employees engaged in protected activity. Silverman, the Respondent's vice president of operations, testified that the cameras were installed in response to increased security concerns following the terrorist attacks on the World Trade Center on September 11, 2001. While acknowledging that the new cameras were installed after the union organizing drive began, Silverman testified that the plan to do so had been in the works for some time, following a security audit performed for the Respondent by an outside security company. According to Silverman, the audit was conducted in response to incidents of car thefts in the parking lot, burglaries, and vandalism, particularly the appearance of anti-Semitic graffiti in the Kuriansky elevators. In 2000, the Respondent had budgeted for enhanced security and solicited bids from several companies but had postponed action because the cost was too high. The September 11 attacks prompted the Respondent to go forward with these plans, despite the costs, because of concerns raised by residents and staff that the Respondent's facility, as a Jewish organization, could be a target for terrorists opposed to Israel. Silverman testified further that the Respondent already had security cameras at some entrances and in the residents' smoking area and that the new cameras were part of an enhanced system. Williams corroborated Silverman's testimony to the extent that she acknowledged that, after September 11, the Respondent conducted lock-down practices and modified procedures for responding to bomb threats as part of an increased security awareness. She also conceded that the Respondent advised its employees that the reason for the new surveillance cameras was September 11 and incidents of thefts and vandalism. Finally, Williams testified that she was also aware of the antisemitic graffiti in the Kuriansky elevators, the only ones in which cameras were installed.

Considering the above evidence, I find that the General Counsel has not established that the installation of the cameras in October 2001 would reasonably lead employees to believe that their union activities were being kept under surveillance. In the circumstances here, where the Respondent's concerns were not trivial and were acknowledged by General Counsel's witness, and where the Respondent's communication to employees of its reasons for the new cameras would allay any concerns that they were being directed at protected activity, the mere existence of new cameras does not amount to a violation. The situation here is, thus, distinguishable from those cases where an employer has been found to violate the Act by installing cameras directed at employee picketing or other protected activity. See *Mercy General Hospital*, 334 NLRB 100 (2001), vacated on other grounds 336 NLRB 1047 (2001); *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), enf'd. 156 F.3d 1268 (D.C. Cir. 1998). Accordingly, I shall recommend dismissal of this allegation of the complaint.

Paragraph 14 of the complaint alleges that the Respondent created the impression of surveillance, in or about November 2001, through statements made by Nursing Supervisor Debra Straubel to employee Lozada. Lozada, a CNA who had been employed by the Respondent for 10 years at the time of the hearing, testified that Straubel's attitude toward her changed after she started openly discussing the Union with her cowork-

ers. According to Lozada, Straubel began to "nitpick" and question her whereabouts. She recalled one occasion in the fall 2001 when Straubel told her that other nurses had complained that Lozada had overstayed her smoke break. Lozada testified that she had not overstayed her break, instead having stopped in a patient's room to answer a resident's call light on her way back to work. Lozada could not recall ever being questioned about overstaying a break before the union campaign. Lozada testified that she told Straubel that she felt as though the nurses were picking on her because of her union activity and that, if it continued, she would file unfair labor practice charges. Straubel was not called to testify by the Respondent. Lozada's testimony regarding this incident is thus uncontradicted.

Accepting Lozada's testimony as credible, I do not find that this interaction with her supervisor would reasonably lead any employee to believe that their union activities were being monitored. I note that Straubel made no reference to the Union or any protected activity during her questioning of Lozada. She merely reported what she had heard from a nurse to determine whether the report was true. When Lozada explained what had happened, Straubel apparently accepted this explanation and no further action was taken. This hardly amounts to the kind of increased monitoring of employees' activities that the Board has found unlawful in other cases. See *New Process Co.*, 290 NLRB 704, 708 (1988). Accordingly, I shall recommend dismissal of this allegation of the complaint. *St. Luke's Episcopal-Presbyterian Hospitals*, 331 NLRB 761 (2000), enf. denied on other grounds 268 F.3d 575 (8th Cir. 2001).

The complaint, at paragraph 11(b), alleges that the Respondent, on or about December 6 created the impression of surveillance by statements or conduct of its vice president, Silverman. It is not clear what evidence the General Counsel is relying on to establish this allegation. The only evidence regarding Silverman that relates to the date alleged in the complaint is Williams' testimony, described above, regarding her visit to Thompson on Tandet West during her break that day and the call she received while eating lunch a short time later from her assistant head nurse, Bentley, that Silverman and others had called Bentley to inquire as to Williams' whereabouts. Shortly after returning to her unit, Williams was summoned to the nursing office by Laidlaw and told, inter alia, that she should not have been on Tandet West talking to other employees who were not on break.¹³ Williams testified further that soon after she returned to her unit from this meeting with Laidlaw Silverman came to the floor and held a meeting with the employees about the wage increase. Because Williams had gone to see Thompson to discuss the timing of this wage increase, in the midst of the campaign, the inference sought to be drawn is that Silverman met with the employees to counteract any campaigning that Williams had done to suggest to the employees that they only got a raise because of the Union.

There is no evidence in the record that Silverman made any statements directly to Williams or any other employee that

¹³ Although the General Counsel argues that Laidlaw's questioning of Williams on December 6 created the impression of surveillance, the complaint does not allege this conversation as unlawful under that theory.

would convey the impression of surveillance. Even if Bentley told Williams that Silverman had called Bentley about her, Silverman's statements to Bentley are hearsay. Although the complaint alleges that Bentley was an agent of the Respondent within the meaning of Section 2(13), the complaint does not allege that the Respondent violated the Act through Bentley's statement. The fact that Silverman met with employees on Williams' floor after she had been questioned about her union activities would not reasonably lead employees in general to believe that their activities were under surveillance. Although Williams may have suspected the two events were linked, this subjective impression on her part does not meet the objective test for analyzing 8(a)(1) allegations. Because the General Counsel has not proved that Silverman created the impression of surveillance on December 6, 2001, I shall recommend dismissal of paragraph 11 of the complaint.

The General Counsel argues in his brief that the events of December 6, 2001, are an example of the Respondent's close monitoring of Williams after it became aware of her union activities. The General Counsel also cites the earlier incident, described above, when DiGangi called Williams into her office in late October and, with Laidlaw present, questioned Williams about reports that she had been seen handing out leaflets and talking to employees who were working on Tandet East.¹⁴ The General Counsel also cites another incident, to be discussed shortly, that occurred on March 8 after Williams had been observed by Laidlaw getting into a car in the Respondent's parking lot.¹⁵ While I found Williams a generally credible witness and much of her testimony regarding these incidents believable, the complaint does not clearly allege the violation the General Counsel seeks to prove through this testimony. Nowhere in the complaint is there a specific allegation that the Respondent violated the Act by more closely monitoring employees who were engaged in protected union activity. Even assuming the evidence factually established that the Respondent was more vigilant toward Williams' union activities,¹⁶ this would not necessarily establish a violation of the Act. I note that Williams was a very open advocate for the Union and never sought to conceal her activity. Moreover, as noted above, Williams admittedly engaged in union activity in resident units by talking to employees who were not on break. She also brought union leaflets into these work areas to distribute to employees. The record reveals that, despite this extensive union activity on her part, and the Respondent's knowledge of it, no disciplinary action was ever taken against her. Under these circumstances, I find that the "close monitoring" of Williams was a legitimate attempt on the part of the Respondent to ensure that employees did not engage in union solicitation and distribution in "patient care areas." The Act permits a healthcare institution to limit

solicitation and distribution in these areas even in the absence of a valid rule. Accordingly, I shall recommend dismissal of the complaint to the extent it alleges that the Respondent's monitoring of Williams was unlawful. See *St. Luke's Episcopal-Presbyterian Hospitals*, supra.

As noted above, paragraph 8(f) of the complaint alleges that the Respondent, through Laidlaw, created the impression of surveillance on March 5 and April 10. The first incident relates to Williams' testimony that, on March 8, as she was leaving the Respondent's facility on an approved early dismissal to take care of a personal matter, she observed Laidlaw at the window of the conference room in Bennett, watching as she got into her ride's car. Williams testified further that she called her unit later that day about some union leaflets she had left behind. Her head nurse, Celeste Turner, told her that Laidlaw had called the unit after Williams left for the day, asking who were the men in the car that Williams got into. Laidlaw admitted calling Williams' unit sometime in March after seeing her get into a car around noontime. Laidlaw testified that she called the unit and asked Turner if she knew that Williams had left the unit and was out of the building. Turner told Laidlaw she was already aware of this. I find that, unlike the earlier incidents, Laidlaw's conduct here would lead an employee to reasonably believe that their protected concerted activities were under surveillance. Laidlaw's observation of Williams when she was in the parking lot and her inquiry regarding the identity of her traveling companions went beyond any legitimate interest the Respondent had in enforcing a legitimate solicitation or distribution rule. Because Laidlaw admitted being aware that Williams was on her own time, her concern about how she was spending that time impinged upon Williams protected activity. It is immaterial that Williams was not engaged in any union activity at the time. It is clear that Laidlaw suspected she was. Based on the undisputed evidence, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 8(f).¹⁷

Paragraph 8(g) of the complaint alleges that the Respondent, through Laidlaw, engaged in actual surveillance of employees' union activities on April 5. The only evidence in the record I could find that would be relevant to this allegation is the testimony of Artarene Thompson regarding what happened to her during the April 5 meeting at which Glickman, the chairman of the Respondent's board of directors, spoke to the employees. According to Thompson, Laidlaw called her out of the meeting while Glickman was speaking. When she and Laidlaw got out in the hallway, Thompson saw James Dimery, a security guard standing there. Shortly thereafter, Silverman and Pryor came down the hallway. Thompson testified that Silverman asked Laidlaw, "[D]id you ask her?" Laidlaw said, "[N]o, I was waiting for you." Silverman then told Thompson that they believed that Thompson had been tape recording the meeting. Thompson responded, "[D]o I look like I'm taping the meeting?"

¹⁴ Although the General Counsel argued that DiGangi's questioning of Williams also created the impression of surveillance, there is no such allegation in the complaint.

¹⁵ Par. 8(f) alleges this incident as creating the impression of surveillance.

¹⁶ Several of the Respondent's witnesses conceded that, as part of the training provided to supervisors in response to the campaign, they were instructed to be vigilant of employees engaging in union activity in the home.

¹⁷ I have been unable to determine, and the General Counsel's brief has failed to enlighten me, regarding what statement or conduct attributable to Laidlaw on April 10 would create the impression of surveillance. Accordingly, I shall recommend dismissal of this aspect of the allegation.

Silverman then asked her directly if she was taping the meeting and if she had a tape recorder. Thompson replied, “[D]o I look like I have a tape recorder?” At that point, she pulled her cell phone out of the breast pocket of her uniform and showed it to Laidlaw, asking, “[D]oes this look like a tape recorder?” No one answered her. Thompson then asked if they were through. When Silverman said yes, she returned to the meeting. Although Laidlaw, Pryor, and Silverman all testified as witnesses for the Respondent, none was asked about this incident. Thompson’s testimony stands un rebutted and is credited here.

It is apparent from the testimony that Laidlaw was closely observing Thompson during this meeting in the belief that she was tape recording Glickman’s speech. Her conduct in calling Thompson out of the meeting, without explanation, would reasonably lead an employee like Thompson to believe that the Respondent was keeping an eye on her. This belief would have been confirmed with the arrival of the Respondent’s vice president and his questioning of her activities at the meeting. The Respondent has not demonstrated any legitimate basis for Laidlaw’s actions. Accordingly, I find as alleged in the complaint that the Respondent violated Section 8(a)(1) in its treatment of Thompson on April 5.¹⁸

Paragraph 17(a) of the complaint alleges that the Respondent, through Pryor, violated Section 8(a)(1) of the Act on March 27 by creating the impression of surveillance. This allegation will be discussed in connection with the 8(a)(3) allegations involving the Respondent’s treatment of Gauthier.

Paragraph 19 of the complaint alleges that the Respondent engaged in unlawful surveillance, on April 10, when its admitted supervisor, Art Caplan, videotaped employees engaged in protected concerted activities. April 10 was the day before the Board-conducted election. There is no dispute that a number of union supporters, including employees of the Respondent, engaged in hand billing at the entrance to the Respondent’s facility, at the bottom of the hill. The handbilling occurred around the time of the afternoon shift change. It is also undisputed that, at the same time, a contingent of antiunion employees, most still in uniform, came down the hill carrying large “Vote No” signs and took up position on the other side of the driveway.¹⁹ Artarene Thompson testified that she saw Caplan, the Respondent’s assistant director of food services, standing on the grass up the hill from the employees, holding a video camera, recording the activity. Although a number of witnesses testified for the Union and the General Counsel regarding this incident, Thompson is the only one to testify to observing this. Melissa Quarles, who was called as a witness by the Charging Party, testified that she was standing next to Caplan at the top of the hill, with a large group of employees and managers, observing the activity of the union supporters and the “Vote No” group. Significantly, Quarles did not testify that Caplan, or any other manager, was holding or using a video camera. Witnesses did identify one of the employees participating in the “Vote No” demonstration, Nelson Rosa, as using a video camera to record the events. The camera apparently belonged to his

girlfriend, who was also an employee of the Respondent and a participant in the “Vote No” rally. No one else was identified as using a video camera. Caplan denied this allegation.

Although Thompson was generally a credible witness, I do not believe her testimony about Caplan videotaping the employees’ activities on April 10. The absence of any corroboration from any of the other witnesses who were there, and especially from Quarles who was closest to Caplan and would have been in the best position to corroborate this testimony, convinces me that Thompson was confused about who had a video camera that day. It appears from the weight of the testimony that the only one using a camera was employee Rosa. There is no allegation, nor any evidence in the record, that Rosa was acting as an agent of the Respondent that day.

The Board, in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), set forth the fundamental principles governing employer surveillance of protected concerted activities. Where employees are conducting their activities openly on or near the employer’s premises, open observation of such activities is not unlawful. *Roadway Package System*, 302 NLRB 961 (1991), and cases cited therein. Where an employer’s surveillance activities go beyond “mere observation,” the Board will find a violation. In *F. W. Woolworth*, supra, the Board found that photographing or videotaping employees engaged in such activity goes beyond “mere observation” and is unlawful because such pictorial record keeping tends to create fear among employees of further reprisals. Accord: *National Steel & Shipbuilding Co.*, supra. In this case, I find that the evidence does not support the General Counsel’s allegations that the Respondent in fact videotaped or otherwise recorded the activity at the bottom of the hill on April 10. I find further that the open observation of this activity by Caplan and other supervisors was not unlawful. The employees had been engaging in similar activity at the bottom of the hill for a number of months before April 10, the activity occurred just off the Respondent’s property, Caplan and the others were standing a good 100 feet away from the employees and did not interfere with their activity. Under the circumstances, employees would not be chilled in the exercise of their Section 7 rights by such conduct. *Roadway Package System*, supra. Accordingly, I shall recommend dismissal of paragraph 19 of the complaint.

3. Alleged solicitation of employees to revoke union authorization cards

Paragraph 9(a) of the complaint alleges that the Respondent, during the period from October to December 2001, unlawfully solicited employees to repudiate the Union and to revoke their union membership by stapling instructions for doing so to paychecks and by posting such instructions on bulletin boards and timeclocks. Paragraph 8(a) alleges that Nursing Supervisor Laidlaw solicited employees to repudiate the Union and to revoke their union membership sometime in November 2001. The Board has held that “an employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees

¹⁸ Although Silverman and Pryor were participants in this incident, the complaint cites only Laidlaw’s conduct as unlawful.

¹⁹ This incident is the subject of the Union’s Objection 9.

would tend to feel peril in refraining from such revocation.” *Mariposa Press*, 273 NLRB 528, 529–530 (1984); *R. L. White Co.*, 262 NLRB 575, 576 (1982). It is undisputed that the Respondent disseminated such information to employees, in Magid’s speeches to the employees in October 2001 and through flyers and postings. Laidlaw admitted speaking to employees, including the General Counsel’s witness Lozada, in the fall 2001. The issue is whether, through these communications, the Respondent crossed the line between provision of information and active solicitation and assistance.

As noted above, Magid held two series of meetings with employees after learning that the Union was trying to organize the Respondent’s employees. At the first meeting, early in October, Magid admittedly spoke about union authorization cards, emphasizing the point that the Union could get in without an election if enough people signed cards and urging the employees not to sign a union card. At the second series of meetings, on or about October 29, Magid addressed the issue of revoking a card once signed. If Magid read the prepared text for this speech verbatim, as he claims to have done, he told the employees the following:

Employees have been coming forward and volunteering that they signed a card but changed their mind. They have asked if there is any way to get their card back.

The answer is yes. [At this point, according to the text, Magid held up the “card revocation posting”].

These notices were posted on the units after a number of employees first asked this question.

As these notices indicate, if you signed a card and changed your mind, you have the right to cancel your card by writing the Union and telling them you are canceling your card.

There are extra copies of this notice in the back of the room if anyone needs them.

In evidence is a flyer with the heading, “SINCE YOU ASKED . . . QUESTIONS & ANSWERS ABOUT THE UNION,” which is most likely the posting Magid held up and made available at the meeting. While advising employees of their right to get their card back, the flyer states: “We do not encourage or discourage employees to revoke union cards, but some of you have asked about how to do this. Below is a sample revocation letter.” The Respondent, in this flyer, also suggested employees keep a copy of their revocation letter “for your records.” The sample reads:

I, _____, no longer wish to be represented by District 1199. Please rip up my card and send it back to me.

The record reveals that several employees in fact utilized this form in an attempt to revoke cards they had signed.

On November 20, 2001, the Respondent distributed another notice to the employees from Magid on the same subject. In this notice, Magid tells the employees that the earlier postings, described above, had been removed but that employees were still asking how to cancel their union authorization cards. Magid then provided the following information:

You have the right to revoke a union card by following these simple steps:

1. Write a letter to the union saying you are a JHE employee and you want to cancel your signed card.
2. Sign and date the letter.
3. Mail (or deliver) your letter to:

***New England Health Care Employees Union, District 1199
77 Huyshope Avenue, First Floor
Hartford, CT 06106***

You may want to keep a copy of your letter for proof. Canceling a union card is a personal decision. We are not attempting to require or persuade anyone to cancel a union card. However, we are again providing information to those who are interested. If you have any questions about this matter, please speak to me or your immediate supervisor. [Emphasis in original.]

In order to assist supervisors in answering questions that this notice might elicit, the Respondent admittedly provided its supervisors, around the same time, with “talking points” on the subject of union cards. These points emphasized the binding legal nature of the cards, the disadvantages of membership, such as union dues and adherence to union rules, the right of employees to refrain from talking to union representatives and signing a card, and ends with an invitation to ask questions of the supervisor if an employee needs more information.

The text of Magid’s speech and the documents distributed to the employees in October and November, on their face, do not violate the Act under the principals of *R. L. White Co.*, supra. See also *Mid-Mountain Foods*, 332 NLRB 229 (2000); *Perkins Machine Co.*, 141 NLRB 697 (1963). The General Counsel offered testimony that Magid went beyond the text of his speech and that at least one supervisor, in answering employee questions, exceeded the bounds of permissible speech.²⁰ For example, Lozada testified that at one of his meetings in the fall 2001, Magid held up the form described above, told the employees they could use it to retract their authorization cards and said, if the employees filled out the forms, the Respondent would “put it in an envelope, stamp it, and mail it to the Union.” On cross-examination, Lozada acknowledged that the latter statement, regarding stamping and mailing the revocations, does not appear in the affidavit she provided to the General Counsel in March, about 5 months after Magid’s meeting. When confronted with this omission, Lozada testified that she believed Magid made this statement at a meeting after she gave the affidavit and that Magid always talked about employees’ revoking their cards. While it is true that Magid held additional meetings with the employees in March and April, before the election, there is no other evidence in the record that he discussed this subject in those meetings.

Magid denied making any such statement to the Respondent’s employees, sticking to his story that, if it wasn’t in the text of a speech, he didn’t say it. Of course, Magid was forced to concede on cross-examination that there were things he told employees that were not in the text, particularly when answer-

²⁰ The complaint does not specifically allege that Magid engaged in such an unfair labor practice. I find, however, that the evidence offered regarding Magid’s statements at the meeting in October falls within the scope of par. 9(a) of the complaint and was fully and fairly litigated.

ing questions from employees that were not anticipated. Moreover, in response to questions from counsel at the hearing, Magid often testified to statements he claimed to have made that were favorable to the Respondent's position but do not appear in any of the text. Finally, Magid contended that he would never have said such a thing because, after all, the Respondent had received training from counsel regarding what to say and what not to say during a union campaign.

As noted above, Lozada also testified that Laidlaw addressed this topic in a meeting she held with employees on Lozada's unit. Her best recollection was that this meeting occurred in late October, in the chartroom behind the nurses' station. Present were four CNAs, including Lozada, and the nurses on duty. According to Lozada, Laidlaw said that she heard the Union was trying to organize and that an employee was going around trying to get people to sign cards. Laidlaw went on to say that anyone who had signed a card could get it back by writing a letter to the Union. In this same meeting, according to Lozada, Laidlaw also asked the CNAs how long each had been working at the JHE. Two of the employees had been employed a relatively short time, under a year. Lozada recalled that Laidlaw told them that, if the Union got in, they would be the first to go because the Respondent would have to cut staff to meet the Union's demands. When Lozada told Laidlaw that she had worked there almost 10 years, Laidlaw said that Lozada could lose all her sick time and vacation time she had accumulated because "all that would go on the bargaining table." In reference to revocation of cards, Lozada testified that Laidlaw invited any employees who wanted to know how to get their cards back to stay after the meeting and she would show them what to write. Lozada testified that one of the new CNAs, an employee named Josephine whose last name Lozada did not know, did remain behind to meet with Laidlaw alone. Finally, Lozada testified that, after this meeting, the posting containing the "sample" revocation letter was posted in the same room and distributed to the employees. Lozada testified further that, at another meeting with Laidlaw that occurred later at a date Lozada could not recall, Laidlaw made the same statement she attributed to Magid, that if employees wrote a letter retracting their cards, the Respondent would put a stamp on it and mail it to the Union. Lozada was the only employee at the meetings with Laidlaw to testify in this proceeding.

Laidlaw admitted holding meetings with employees on Lozada's unit as part of the Respondent's campaign to convince employees that a union was not in their best interests. She conceded that she believed it was important to get the Respondent's message out to the employees, a message to which she wholeheartedly subscribed. She also admitted addressing this particular subject at one of those meetings. According to Laidlaw, she simply handed out the Respondent's literature about revoking or canceling union cards, told the employees that she had just heard it was possible to do that, and asked employees if they had any questions. Laidlaw testified that she also told the employees that, if they needed more information about it, she would try to get it for them. Laidlaw claimed she had no recollection about anything else she said in this meeting. Despite this lack of recall, she affirmatively denied ever telling the employees that the Respondent would put a stamp on the letters

and mail them to the Union for the employees. According to Laidlaw, she knows she did not say this because she attended an educational session for supervisors the same day, at which they were first told about the procedure for revoking union cards, where she had been told that supervisors could not say something like that.

Laidlaw did corroborate Lozada's testimony that one new employee, Josephine Thelours, sought Laidlaw out after the meeting asking for information about how to get her card back. According to Laidlaw, she told Thelours she would get the information for her. Laidlaw admittedly met with Thelours again and gave her the sample language that appears in the Respondent's literature and told Thelours this is what she needed to write if she wanted her card back. Although the evidence described above clearly establishes, and it is essentially undisputed, that the Respondent distributed the flyer described above containing the sample language, Laidlaw denied seeing it before the hearing and denied that it was posted on the unit or distributed to employees. Laidlaw testified that she never saw any revocation letters signed by employees and did not know if any of the employees followed through with the instructions she provided.²¹ Laidlaw denied making the additional statements attributed to her by Lozada regarding seniority and loss of benefits but she admitted talking about these subjects during her many meetings with employees. According to Laidlaw, she always discussed these things in the context of talking about the collective-bargaining process, following the instructions given to her regarding what she could and could not say on that subject.

Although I found Lozada to be a generally credible witness, I do not credit her testimony that Magid told the employees that the Respondent would put a stamp on and mail employees' revocation letters to the Union. The omission of such a critical statement from the affidavit she gave about this same meeting, closer in time to the events, is glaring. Her explanation that Magid said this after she gave her affidavit is implausible. By the time she gave the affidavit, the Union had already filed the petition and there would be less of a need for the Respondent to solicit employees to revoke their cards because the secret ballot election that the Respondent desired would soon take place. I also note the absence of any corroboration that such a statement was made, or that the subject of revocation of union cards was even mentioned in meetings after Lozada gave her affidavit. Because there is no evidence that the Respondent's written communications with employees regarding this subject went beyond merely providing them with information regarding their rights, and because I do not credit the testimony that Magid's oral communication on the subject exceeded permissible communication of information, I shall recommend the dismissal of paragraph 9(a) of the complaint.

²¹ The record contains a union card signed by "Marie Josephine Valerius" dated September 29, 2001, and a handwritten revocation letter with the same signature dated October 18, 2001. There is no dispute that this is Josephine Thelours, her name having changed after these events. Significantly, Thelours did not use the form provided by the Respondent but appears to have composed her own letter conveying her wish to revoke the card.

I did find Lozada's testimony regarding Laidlaw's meetings with employees more credible than the denials elicited by the Respondent from Laidlaw. Lozada, as a current employee of the Respondent, was taking a risk in testifying adversely to the Respondent's interest and, other than the fact she is a union supporter, there is no reason for her to have fabricated this testimony. I note that, although the Respondent's counsel showed that Lozada's testimony regarding Magid was inconsistent with her prior affidavit, no similar inconsistency was shown between her testimony and the affidavit with respect to Laidlaw's actions. I infer that had such a conflict existed between the affidavit and the testimony, the Respondent's counsel would have brought that to my attention. In contrast, Laidlaw's denial that she told employees that the Respondent would put a stamp on and mail employees' revocation letters to the Union is hollow considering her avowed difficulty in recalling any other details about the meetings she held with the employees. Moreover, Laidlaw admitted that she told employees to see her after the meeting if they wanted information on how to get their cards back. The Board has held that such an invitation converts an otherwise lawful communication of information to a solicitation of employees to reveal their degree of support for the Union. *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1220-1221 (1987), enf. denied on other grounds 851 F.2d 180 (8th Cir. 1988); *Hatteras Yachts, AMF, Inc.*, 207 NLRB 1043 (1973) (making employees come to the personnel office to get information to revoke their union cards). I also credit Lozada's testimony that Laidlaw advised employees of their right to revoke their cards, invited them to see her to find out how to do so and offered to stamp and mail revocation letters for the employees in the context of threatening statements regarding employees jobs and benefits.²² Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act through the statements of Laidlaw, as alleged in paragraph 8(a) of the complaint.

4. The December wage increase and alleged promise of more

a. *The wage increase*

The complaint alleges, at paragraph 10, that the Respondent violated Section 8(a)(1) of the Act by granting its employees a wage increase on or about December 6, 2001. It is undisputed that a wage increase was announced and implemented in December 2001 at a time when the Respondent was aware the Union was attempting to organize its employees. The Respondent contends that the decision to grant a wage increase at the time had been in the works since April 2001, long before the start of the Union's organizational campaign, and that the Respondent's reasons for increasing its employees' wages were unrelated to the campaign. The Respondent also argues that the fact the Respondent granted wage increases to employees whom the Union was not seeking to represent militates against a finding that the increase was intended to interfere with employees' choice of representative.

²² These alleged threats will be discussed in more detail, *infra*. At this point, suffice it to say, I credit Lozada over Laidlaw regarding these statements.

Alyssa Rotella-Soderberg, the Respondent's vice president of health services and administrator, testified as the Respondent's primary witness with respect to this allegation and described the process that led to the December 2001 wage increase. According to Rotella-Soderberg, the process began in April 2001, soon after she was hired by the Respondent. She testified that she began a review of the Respondent's entire wage structure as a result of problems she encountered in hiring and retaining nurse managers.²³ Rotella-Soderberg testified that she quickly came to the conclusion that the Respondent's compensation program lacked any formal structure or consistency in application, resulting in internal inequities. She also noted that the Respondent hadn't conducted a formal market analysis to determine whether the wages it paid its employees were competitive in at least 15 years. According to Rotella-Soderberg, she reached the conclusion that an outside consultant should be hired to review the entire compensation program and she recommended this course of action to the executive management committee in April. She also recommended a particular consultant with whom she had worked at another facility, Mary Novak-Jandrey. The committee agreed with her recommendation and invited Novak-Jandrey to the facility to discuss such a project. Novak-Jandrey had her first meeting with the Respondent in May 2001.

Rotella-Soderberg testified further that Novak-Jandrey submitted a proposal to review and redesign the Respondent's compensation program on May 23, 2001. At that time, according to Rotella-Soderberg, the Respondent's management was concerned with the cost of this project, as proposed by the consultant. She recalled that Novak-Jandrey proposed receiving about \$30,000 for her work on this project. No further action was taken on this proposal until the end of July 2001, after the Respondent had started its annual budget process. In an effort to have the work done more cheaply, the Respondent solicited other bids in August. Rotella-Soderberg testified that, after reviewing these bids, the management committee decided to hire Novak-Jandrey as its consultant for this project. Although Rotella-Soderberg testified that this decision was made in August, the Respondent could not go forward with the project until its board of directors approved the expenditure as part of the Respondent's annual budget. Rotella-Soderberg testified that final approval of the budget for the fiscal year beginning October 1, 2001, did not come down until mid-October. By that time, the Respondent was admittedly aware of the union activity at its facility. Rotella-Soderberg acknowledged that, at that point, the only thing the directors had approved was the study. The Respondent had not yet budgeted for any wage increases that might result from such a review.

Rotella-Soderberg testified that Novak-Jandrey started her work on this project when she visited the facility on November 9, 2001, by which point the union campaign was in full swing. Under her initial proposal, submitted in May, Novak-Jandrey anticipated that the first phase of the project, i.e., "a market analysis and review and adjustment of salaries and

²³ It appears from the evidence in the record that the Respondent's nurse managers occupy positions similar to a charge nurse in most nursing homes.

grades and ranges,” would take her 6 to 8 weeks. On November 27, the Respondent’s president, Magid, issued a memo to the employees announcing that the consultant who was hired to review the Respondent’s wage and salary program had started her on-site work on November 9 and had met with department managers on November 20 to explain the work she was going to be doing.²⁴

Novak-Jandrey apparently finished her work significantly ahead of schedule because the evidence indicates that she submitted a “Preliminary Compensation Market Review” containing a recommendation for a wage increase within 3 weeks of her first visit on November 9. Rotella-Soderberg testified that the Respondent implemented the December 2001 wage increase based on Novak-Jandrey’s recommendation but acknowledged that the Respondent did not follow the recommendation as to the size of the increase. Novak-Jandrey recommended two options for the Respondent: (1) a market adjustment for all nonmanagement staff at an estimated cost of almost \$850,000; or (2) creation of an entirely new wage structure with wage adjustments capped at 4 cents an hour, estimated to cost in excess of \$1.5 million. Rotella-Soderberg testified that the Respondent chose to implement the first option, but with a smaller increase to reduce the cost. She estimated that the cost of the wage increase, as implemented by the Respondent, was about \$600,000 and that the board of directors had not included this in the budget approved in mid-October.²⁵ On December 6, 2001, the Respondent issued a memo to all employees announcing its decision to implement a “technical market adjustment,” effective December 16, 2001. Under this adjustment, registered nurses were to receive a \$1.25 hourly increase, licensed practical nurses would receive an increase of 70 cents an hour, service employees (essentially the unit that the Union sought to represent) would receive a 60-cent-an-hour raise and other employees would receive a 40-cent-an-hour raise.

Novak-Jandrey’s preliminary report suggests that the Respondent and its consultant were aware of the impact of a wage increase on the union organizing campaign. Novak-Jandrey recommended, for example, that the Respondent “move the ranges of selected positions closer to local union rates” and “provide all non-management employees with a market raise to support employee relations.” Rotella-Soderberg also acknowledged, on cross-examination, that she was aware of employees’ concerns about the Respondent’s wage structure and that these concerns were a factor in employee support for the Union.

In contrast to Rotella-Soderberg’s description of the process preceding the wage increase, Silverman claimed in his testimony that the Respondent had a regular practice of granting

wage increases at that time of the year. The evidence offered to support this claim is not persuasive. Other than merit increases granted to employees based on annual performance reviews and increases resulting from promotions, the only other “regularly recurring” wage increases Silverman could recall were: (1) a June 1999 wage increase granted to all employees as a result of legislation passed by the State of Connecticut that year, which increased the reimbursement rate for nursing homes with the understanding that the additional moneys would be used to increase employees’ wages and benefits; and (2) an October 2000 “technical adjustment” of 40 cents an hour for service and maintenance employees to remain competitive in the labor market. The September 28, 2000 memo, announcing the latter increase stated that the employees had been told in July 2000 that the Respondent was considering such an increase and that the board of directors had approved the increase.²⁶ Silverman recalled a third instance of this “regular practice,” after his memory had been refreshed by the Respondent’s counsel, i.e., a December 1999 increase in the weekend and shift differential. The Respondent offered no documentary evidence to support the claim of a regular practice of granting general wage increases or “technical market adjustments.” The lack of such evidence is consistent with Rotella-Soderberg’s description of the Respondent’s compensation program as it existed when she arrived, i.e., no formal structure or consistency with regard to wage increases.

The Supreme Court recognized, many years ago, that:

Section 8(a)(1) prohibits . . . conduct immediately favorable to employees which is undertaken with the express purpose of impinging on their freedom of choice . . . and is reasonably calculated to have that effect. . . . The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of [the] benefit now conferred is also the source from which future benefits must flow and which . . . may dry up if not obliged.

NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964). Over the years, the Board has applied this rationale to find a violation under circumstances similar to those found here. Although the Board has held that the grant of benefits during an election campaign is not per se unlawful, the Board will draw an inference of improper motivation and interference with employee free choice where the evidence shows that employees would reasonably view the grant of benefit as an attempt to interfere with or coerce them in their choice of representative. An employer may rebut this evidence with proof of a legitimate business reason for the timing and grant of the benefit. *Southgate Village, Inc.*, 319 NLRB 916 (1995); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), *enfd.* 48 F.3d 1362 (4th Cir. 1995), *affd.* 517 U.S. 392 (1996); *American Sunroof Corp.*, 248 NLRB 748 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981). More recently, the Board held that the timing of an

²⁴ In this memo, Magid refers to an earlier “announcement” he made, in response to questions from employees in September, that the Respondent had already decided to retain a compensation analyst. The only evidence in the record of such an announcement is the text of the speech Magid gave to the employees on October 29, 2001. There is no evidence that the Respondent informed employees of this process before the advent of the Union.

²⁵ This fact must be considered in the context of the Respondent’s statements to employees, during meetings about the Union, that the Respondent was already experiencing financial difficulties and union wage demands could have an impact on employees’ job security.

²⁶ The same memo announced improvements in fringe benefits offered to the employees, which Silverman claimed was part of the Respondent’s “regular practice” of making adjustments to wages and benefits.

employer's announcement of wage increases during a union campaign may be unlawful even if the wage increase itself does not violate the Act. *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002), and cases cited therein.

I find that the evidence in the record before me is sufficient to support the inference that the Respondent timed its announcement and granted the December 2001 wage increase in order to interfere with employees' free choice. Contrary to Silverman's testimony, the Respondent had no regular practice of granting general wage increases, or "technical market adjustments," at any particular time of the year. Although employees may have heard something about the hiring of a consultant to review the Respondent's wage structure, no formal announcement of this project was made until after the Respondent became aware of the Union's organizing activity and, certainly, no timetable for implementation of the results of such a study had been previously disclosed to the employees. Thus, employees would reasonably view the December 2001 announcement of this previously unscheduled wage increase as timed to affect their support for the Union.

The evidence offered by the Respondent to rebut this inference does not withstand scrutiny. Although I have no doubt that Rotella-Soderberg was testifying truthfully regarding the process of hiring the consultant, it is clear that the Respondent was in no hurry to complete this process until it became aware of the Union. Rotella-Soderberg's recommendation that the Respondent do a complete review of its wage structure to address the inequities she observed languished from April until mid-October. Only then, after the Respondent was well aware of the organizing drive and had begun responding to it through meetings and literature, did the board of directors approve the expenditure of funds to hire the consultant. Then, with lightning quick speed, the consultant completed her work, made a recommendation and the Respondent accepted that recommendation, all within about 6 weeks. Moreover, the Respondent's executive committee apparently decided to grant approximately \$600,000 in wage increases without any prior budgetary provision for it. This stands in stark contrast to the reluctance to spend \$30,000 to hire the consultant until the directors finalized the annual budget. In *American Sunroof Corp.*, supra, the Board, in dismissing a similar allegation, noted the significance of the administrative law judge's finding that the employer in that case did not accelerate completion of its new pension plan in response to an upcoming union election and that the employees would have been notified of this new benefit at the same time even were no union around. There is no reliable evidence in this case that the Respondent would have gone forward with the recommendations of the consultant when it did had it not been faced with a vigorous campaign from the Union to represent its employees, a campaign in which employees' dissatisfaction with their wages was a significant element. Finally, I note that, while the Respondent may have been planning a wage and salary review before the onset of the Union, the size, timing and application of any wage increase to be granted were

still entirely within its discretion at the time the Union arrived on the scene. See *Holly Farms Corp.*, supra.²⁷

Accordingly, based on the above, I find that the General Counsel has proved that the December 2001 announcement and grant of a wage increase violated Section 8(a)(1) of the Act, as alleged in the complaint.

b. Alleged promise of additional increases

As previously noted, Tawana Williams testified that, on the day the wage increase was announced, Silverman came to her unit and held a meeting of the employees who were there. According to Williams, Silverman told the employees that "the study has been done and the first allotment of the pay has arrived. The study should be completed by the end of February, sometime in February, and there is more to come with that." Silverman denied making such a statement although he admitted meeting with the employees on Williams' unit. He even acknowledged that Magid sent him to meet with this particular group of employees, even though the nursing department was not within his chain of command, because Williams worked on that unit. Silverman explained that he was sent because a nursing supervisor was not available to meet with the employees and Magid was concerned that the Respondent's message be communicated correctly to this group of employees because Williams worked there. Silverman testified that what he told the employees was that the first phase of the consultant's study was completed, that the study would continue, and that additional adjustments could be made if found appropriate.

I find that Williams' version of this meeting is more credible than that of Silverman. This meeting clearly occurred in response to the reports received by Silverman and others in management that Williams was "visiting" other units and talking to employees about the wage increase that had just been announced. It is obvious that the Respondent wanted to counteract any propaganda that Williams was disseminating. In meeting with the employees, Silverman would have been attempting to dispel any notion that the employees were only getting this raise because the Union was around. It is highly likely that he would have done so by referring to the consultant's study and holding out the promise that additional improvements were likely as the consultant continued to review the situation. His statements, which implied that the employees would be receiving additional wage increases in the future, would have a reasonable tendency to discourage employee support for the Union out of fear that the Respondent would not grant such increases if they chose union representation. See *NLRB v. Exchange Parts Co.*, supra; *Garry Mfg. Co.*, 242 NLRB 539 (1979), enf'd, 630 F.2d 934 (3d Cir. 1980). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged at paragraph 11(a) of the complaint, through Silverman's promise of another wage increase if employees reject the union as their bargaining representative.

²⁷ In *Holly Farms*, supra, the Board also rejected a defense based on the fact that the employees in the unit sought by the Union represented only a small portion of the employees who received the wage increase at issue.

c. Alleged implied promise of benefit

Paragraph 12(c) of the complaint alleges that the Respondent, on March 29 and April 2, through Magid, impliedly promised employees increased benefits and improved terms and conditions of employment if they did not select the Union as their bargaining representative. The General Counsel cites three memos issued by Magid to the employees in late March and early April as establishing this violation. All three memos purport to update the employees on the work of the consultant, Novak-Jandrey.

On March 29, the Respondent distributed a letter, addressed to "11-7 shift" from Magid, advising the employees that Novak-Jandrey's follow-up report, which Magid had hoped would be ready that day, would be distributed to all employees on Monday, April 1. He said, in this letter, that the report would "highlight . . . issues that JHE needs to address including wage and salary adjustments, compensation information, job descriptions and restructuring." On or about April 1 Magid distributed a summary of Novak's report, which is dated March 31, containing the following recommendations: "restructure current program to ensure fairness"; "maintain competitive pay"; and "change merit pay program." Magid advised the employees that the changes recommended by the consultant would have a major impact on the Respondent's budget and that the Respondent "would have to evaluate its ability to bear these costs." He asked for the employees' "help to find ways to meet the new wage goals, maintain quality care, and keep staff members with no layoffs." To do this, Magid promised to form a joint management-employee team to look at these issues and invited volunteers to participate in the process. On April 2, Magid distributed another memo to the employees promising changes in the human resources department, recommended by the consultant, to address complaints from employees about the service they received from that department.

In addition to these memos, the prepared text of a speech that Magid gave to the employees around March 29 includes reference to the compensation survey from the consultant. In that speech, which Magid claims to have read verbatim, he first tells the employees that the Respondent had asked the employees, during the last union election, to give the Respondent a chance. He then said that the employees gave the Respondent that chance when they rejected both unions. He acknowledged that the Respondent had not done enough since that election to make things better. The text shows that Magid then made some commitments to things he would do "no matter what happens on April 11." Then he talked about the consultant, stating:

There is one other thing. I received the compensation survey from the consultant. Unfortunately, I received it several days after we got the petition from the union and there was nothing we could do about it then.

We spent a lot of time and money on this consultant and I think her analysis is good. She has recommended a number of changes to improve our wage and salary system.

She has recommended that she continue her study by reviewing and updating job descriptions, looking at job grades, and considering how we give credit for seniority,

including the possibility of implementing a wage scale or a similar arrangement.

She has asked us for approval to continue her work and I have approved it. Regardless of what happens, I think this is too important to leave it unfinished.

So that's where we are. I recognize that we did not do enough after the last election, and I accept responsibility for that. But I have described some of the things that are in our future. I ask only that you vote based upon what you believe in your hearts is best for you, the Jewish Home, and our residents.

The memos and the speech, taken together, conveyed to the employees that the Respondent was in the process of making improvements in the employees' wages and other terms and conditions that had been the subject of employee complaints. He suggested, in his speech, that the Respondent could not do anything now because the Union had filed the petition, leaving the implication that, if there was no Union, the Respondent could implement the changes recommended by the consultant. Magid also utilized the theme, to be picked up later by Glickman, that the Respondent could resolve the employees' complaints better by working together without the Union. These statements clearly implied that the Respondent would carry out the improvements only if the employees rejected the Union and agreed to work directly with the Respondent. Such an implied promise violates the Act and I so find. *Reno Hilton Resorts Corp.*, 319 NLRB 1154, 1156 (1995).

5. Alleged threats of closure and job loss

Paragraphs 9(b) and (c) of the complaint allege that the Respondent, through posters and leaflets displayed and distributed to employees in March and April, threatened employees with closure of the facility and the loss of jobs and benefits if the Union were selected as the employees' collective-bargaining representative. At paragraph 12(a), the complaint alleges that the Respondent, during the October–November 2001 period, through statements of its president, Magid, threatened employees with closure of the facility, loss of benefits, loss of jobs and permanent replacement if they selected the Union. The complaint alleges, at paragraph 18(c), that the Respondent again threatened employees with job loss, discharge and closure of the facility, during speeches given by chairman of the board, Glickman, on April 4 and 5.

The General Counsel placed in evidence a poster, "11 x 17" in size, featuring a bright red list of 16 nursing homes that had been organized by the Union and were closed or bankrupt. At the top of the poster, in large brightly colored lettering, appears the following:

The union says it can deliver

SECURITY

For you and your family

—District 1199 handout, 3/12/02

BUT WHAT'S THE TRUTH?

At the bottom of the poster, after the list of closed or bankrupt homes, is the following disclaimer:

We're not saying JHE would go bankrupt or close if a union got in, but having a union is no guarantee of job security.

PLEASE VOTE NO ON APRIL 11.

The words "security" and the "vote no" request are in red type. The uncontradicted testimony of the General Counsel's witnesses establishes that this poster was displayed for several weeks before the election.

The General Counsel also cites one leaflet admittedly distributed to employees during the preelection campaign, in March or April, as containing threats of the loss of jobs and benefits. The leaflet, which asks the question, "Why does the Jewish Home oppose the Union?" provides the following answer:

A union won't help the Jewish Home. We would have to devote lots of money to contract negotiations, union grievance procedures, and possible strike preparations. That's money that could buy equipment and supplies . . . improve our facility . . . or fund your wages and benefits.

Will a union really help you? District 1199 failed to win any pay increases for 2001, any improvements in staffing, or free health benefits for many 1199 members who, like you, pay something for their health insurance. But it did subject them to a damaging strike that cost many union members more than \$1000 in lost wages.

A union won't help our residents or their families. In fact, in light of last year's strike-related sabotage, they could live in constant fear of possible strikes or other union activity that would disrupt their home and their care.

That's why we oppose the union.

Be informed.

This is your future.

The General Counsel argues that the poster and this leaflet must be considered in the context of statements made by Magid and Glickman in their speeches to the employees.

The General Counsel relies on the testimony of Melissa Quarles to establish the allegation that Magid threatened the employees in the October–November period. Quarles, a part-time dietary aide who had worked for the Respondent about 2 years at the time of the hearing, testified that she attended one meeting at which Magid spoke. She was unable to recall when this meeting occurred more precisely than that it was before the Union's February 28 community election. She recalled that Magid told the employees not to vote in the community election because it was not a real election. She recalled further that the meeting was in the recreation room and that 75–80 employees from a mix of departments were there. She also recalled Vice President Silverman being present. Quarles testified that Magid was not holding any papers in his hand and was not reading from anything when he spoke to the employees. According to Quarles, Magid told the employees at this meeting not to vote for the Union, that other homes the Union had organized had closed down and that, if the Union came in, the Respondent would close down because it did not have enough money for the Union to come in. On cross-examination, Quarles testified that Magid said that "all the 1199 homes" had

closed down and that employees' in the audience disputed this statement, shouting out that this was a lie. Quarles testified further, on cross-examination, that Magid did not identify any of the union homes that had closed and that he did not make the same disclaimer that appears on the poster. Quarles testified that she spoke up at this meeting, commenting in response to Magid's statements about a supervisor who had been in the Union, "it's good for you to keep your enemies close by you." She testified that Magid then asked her what she meant by that. She did not testify as to the response, if any, she gave to this question.

One other employee, Harmenta Needham, testified to similar threats by Magid. Needham, an employee of the Respondent for more than 3 years at the time of the hearing, recalled that Magid spoke to the employees about the Union in the fall 2001. She testified that Magid said, "[T]hat the place would shut down like Grant Street did and we were going to go out on strike, and when the strike is over, we won't have a job." Grant Street Health & Rehab. Center is one of the union-represented homes listed on the poster as having closed. On cross-examination, after being shown a pretrial affidavit she gave, Needham was forced to acknowledge that she previously said that Magid used the word "could" not "would." She insisted, however, that both Glickman and Magid said the Respondent *would* shut down in response to the Union at the meetings closer to the election.

As previously noted, Magid admittedly spoke to the Respondent's employees about the Union two times in October 2001. He also admitted holding three additional series of meetings after the Union filed its petition, two in March and one in April. Magid testified that he read verbatim from the prepared text at each meeting and only spoke extemporaneously when responding to employee questions. Magid denied making the threats attributed to him by Quarles and Needham. Magid also denied being at a meeting where an employee made the statement, about "keeping your enemies close," that Quarles claims to have made. Magid did acknowledge talking to the employees about the Respondent's financial condition, including the fact that the Respondent was losing "staggering amounts of money," in the context of his annual budget meetings in October 2001. He also acknowledged that Glickman spoke about the Respondent's losing money in his meetings closer to the election.

Magid also acknowledged speaking about the closure and bankruptcy of union-represented homes, even though this does not appear in any of his scripts. According to Magid, he probably talked about this in response to employees' questions. He testified that he told employees that "there were a lot of homes in bankruptcy, near bankruptcy, that had closed, that were 1199 homes." He testified that he also said to the employees "that just because they were represented by the Union, doesn't tell the whole story. There could've been lousy management, there could've been inadequate resources, they could have agreed to too rich a contract and couldn't have afforded it. But that the majority of homes that had closed and the majority that were bankrupt or near bankrupt were 1199 homes." Magid recalled mentioning at least a few homes by name, citing as an example Grant Street Partnership, a facility not far from the Respondent,

which was listed on the poster as an 1199 home that closed in 1999, and Birmingham in Derby. On cross-examination, in denying that he told employees that 1199 caused the homes to close or go bankrupt, he admitted saying that he didn't know what happened, but "isn't it striking that all of these are 1199 homes that are closed, in bankruptcy, or near bankruptcy."

The texts of Magid's speeches, which are in evidence, contain no reference to close 1199 facilities. There are references, in the first speech he gave at the beginning of October, and in a speech given in March, soon after the Union filed its petition with the Board, to strikes by 1199 and the loss of benefits by employees at union-represented homes in Connecticut, including a specific mention of employees at Birmingham health center paying more for their health insurance after a strike than they did before. The text of the latter speech does indicate that Magid opened the floor to questions from employees at the end of that meeting.

Although the evidence in the record shows that Magid did not meet with the employees before the community election, as Quarles recalled, the prepared text of the meeting he held soon after the Union's petition was filed, at the beginning of March, shows that Magid referred to the community election, telling the employees that "the NLRB vote is the only one that counts." This tends to corroborate Quarles' testimony that Magid said that the community election was not a "real election." The fact that this same text refers to loss of benefits by unionized employees at other homes also tends to corroborate the testimony of Quarles and Needham that Magid mentioned the closure of other unionized facilities. I thus credit Quarles and Needham regarding statements they attributed to Magid.

There is no dispute that Glickman met with the Respondent's employees, in two sets of meetings, before the election. Both series of meetings occurred in April, about a week apart, with the last one held only a couple days before the election. There is also no dispute that Glickman, unlike Magid, did not use a prepared text or read any portion of his speeches, preferring to speak extemporaneously. Magid was present at all meetings at which Glickman spoke. The text of Magid's remarks, which preceded one of Glickman's speeches, indicates that a video was shown to the employees before Glickman spoke. The video apparently portrayed employees relating their experiences with the Union during a recent strike at another facility. The General Counsel called seven witnesses to testify about the meetings held by Glickman. Five of the witnesses were still employed at the time of their testimony. Glickman also testified and denied making any alleged threats during his meetings.

Ebonie Stewart, one of the alleged discriminatees, testified that she attended one meeting at which Glickman spoke. This meeting occurred on April 4, a week before the election. Stewart testified that this was the first time in the more than 5 years she had worked there that Glickman met with the employees. The meeting occurred in the recreation center with about 75 employees present from all departments except nursing. The employees were told that they could not ask any questions but could write any questions they had on an index card and turn them in after the meeting. After being introduced by someone from human resources, Glickman told the employees that he had only been on the Board for 5 months and was not aware

that people were dissatisfied with the home. He told the employees that he was not there to "bash the Union," that he was not saying the Union was bad, just that the employees did not need one there. Stewart recalled that Glickman told the employees that they could work out their problems if given a chance, citing some examples of employees who'd brought complaints to management and had them resolved. Glickman then said that only "lazy employees" wanted the Union and that the Union could do nothing for them if they were fired. Glickman then told the employees that the Union was also in debt and that the only way the Union could make money was to organize nursing homes and collect dues. Stewart recalled that Glickman also spoke about how the Respondent was doing and said he didn't want to see it "go down." He told the employees that the Respondent was already a half million dollars in debt and, if the home was forced to give employees a \$2.50/hour raise, it would cost roughly \$6 million, which the Respondent didn't have. Glickman added that, if the Union won and it was time to negotiate, he would hire the best lawyer in town to back up his "no" at the bargaining table. Stewart testified that Glickman also told the employees that the home could close as a result of the Union's demands, that the Respondent would have to cut staff if the Union got in and "then family members aren't going to want to keep their family member in a place where it's half the people that are supposed to be there." Stewart gave the most detailed account of this meeting, which is probably because she took notes during the meeting that she used in the preparation of her affidavit.

Helen Wright, a CNA on the 11-7 night shift who has worked for the Respondent in excess of 13 years, testified that she had never seen Glickman before he came to the home, in April, to speak to the employees about the Union vote. She attended a different meeting than the one Stewart attended. Wright recalled that about half of the third shift employees were at the meeting she attended, which was also held in the recreation center. According to Wright, Glickman introduced himself as Magid's boss. Glickman told the employees that if the Union came in and negotiated for a \$1 raise, they wouldn't get it, and if the Union negotiated for a \$2 raise, they wouldn't get it. Wright recalled that Glickman then said he would close the place down if necessary. When one of the employees at the meeting spoke up, asking what he would do with Magid's mother-in-law, a resident of the home, Glickman answered, "there is New Haven, there is Darien," referring to other Jewish Homes in the State of Connecticut. Wright testified that she could recall nothing else from this meeting, claiming that she became upset when Glickman said he would close the facility. She did recall that he ended the meeting by telling the employees that he was Magid's boss and Magid has to listen to what he says.

Thompson, employed by the Respondent for seven years, testified that she attended a meeting at which Glickman spoke on April 5, also in the recreation center. She recalled that there were about 20-30 employees at this meeting. This was also a different meeting than the ones attended by Stewart and Wright. Thompson already knew Glickman because she has cared for his mother, another resident of the home. Thompson also recalled that employees were told not to ask questions, but

to write them down and submit them in an envelope that was provided. After being introduced by someone from Human Resources, Glickman told the employees that he is “like a doctor for business . . . I go in and see if a sick business is worth saving. Or I shut it down.” Thompson testified that Glickman told the employees that the Respondent had lost a lot of money in 2000 and 2001 and that they would lose a lot more money this year because of the raise employees had received in December. She recalled that he then said that the reason the Union wants to organize the Respondent’s employees is because they also lost a lot of money and needed to make it up with dues collected from the employees. It was at this point in the meeting, according to Thompson, that Laidlaw asked her to leave the meeting in the mistaken belief that Thompson was tape recording it. When she returned to the meeting, Thompson heard Glickman say if the Union came in and the home started to go downhill, he “had no problem taking his family out and shutting down the place.” Thompson recalled that he then asked the employees to give the Respondent another chance and, if the Respondent didn’t do what they say they’re going to do, the employees could always have another vote because the Union would always be there. According to Thompson, Glickman finished his speech by telling the employees that “he is the boss, and everybody reports to him, everybody . . . but God.” On cross-examination, Thompson testified that she did not recall Glickman talking about negotiating with the Union, or mentioning any particular raise demanded by the Union. She also did not recall him emphasizing staffing as a large part of the Respondent’s costs.

Tawana Williams was at the same meeting as Thompson. She corroborated Thompson’s testimony that Glickman asked the employees to give the Respondent another chance and that he said he would take his mother to another home and close the Respondent’s facility. She recalled that the latter statement was made in connection with his discussion of Union wage demands. According to Williams, she challenged Glickman’s statement, standing up and saying that he did not have the power to close down the home.²⁸ Williams corroborated Thompson’s testimony that Glickman ended the meeting by telling the employees that Magid answers to him and he answers to no one but God. Williams also corroborated Thompson’s testimony that this was the same meeting at which Thompson was called outside by Laidlaw. Williams recalled, in contrast to Thompson’s testimony, that there were 75–100 employees at this meeting. She also recalled, contrary to the other witnesses, that Glickman was using notes and would occasionally look down at them while he spoke.

Williams testified that she attended another meeting at which both Magid and Glickman spoke and a video was shown. According to Williams, it was at this meeting that cards were distributed for employees to write any questions they wanted to ask. She recalled that, at this meeting, after the video was shown, Glickman again asked the employees to give the Respondent another chance and to vote “No” in the election. On cross-examination, Williams acknowledged that the alleged

threat to close was not mentioned in a pretrial statement she gave, which was otherwise consistent with her testimony. Williams explained this apparent conflict by testifying that the pretrial affidavit at issue only referred to the second meeting and, according to Williams, Glickman did not say he would close the facility at this meeting.

Carmen Dyer, another alleged discriminatee, testified that she attended a meeting with Glickman on April 4. Because she was working the evening (3–11 p.m.) shift, she attended a different meeting than the ones described by the above witnesses. There were only 10–12 employees at the meeting she attended. She recalled that, after being introduced by someone from human resources, Glickman told the employees not to ask any questions, to write them down and give them to the woman from human resources who had introduced him. At that point, according to Dyer, she commented out loud, “I don’t know if he thinks we’re stupid but why can he speak and we can’t?” Glickman then asked her if she thought that was funny. She replied that she was not being funny. Glickman then told the employees that they must think about their families because, if the Union won, the Respondent would close. Dyer testified that she stood up at that point and said, “[W]hat are you going to do with all the residents if you close down.” She told Glickman that she didn’t believe him and walked out of the meeting before it was over. On cross-examination, Dyer acknowledged that Glickman said more than this, but she could only recall the exchange that took place between him and her.

Lozada also testified about Glickman’s meetings. She recalled attending two at which he spoke, in addition to the meeting with Magid described above. According to Lozada, at one of the meetings at which a video was shown, Glickman told the employees that there was no way he would agree to a \$2/hour raise, that he would tell his lawyers not to agree to such a demand. He told the employees they would either have to go on strike and be replaced, or the home would shut down. She recalled Glickman saying he would take his mother out of the home and close it. Lozada testified that Glickman’s mother is one of the residents she has cared for.

Finally, Needham testified that she attended one meeting at which Glickman spoke. The meeting she attended took place in the afternoon and was one of two meetings that day, one in the morning and one in the afternoon. It is unclear whether the meeting she attended is the same one described by Lozada, who worked the same shift. It is clearly a different meeting than the ones described by the other witnesses because they occurred at different times, on different shifts or involved nonnursing employees.²⁹ Needham testified, on direct examination, that Glickman said: “they would close all the building, take his mother out of there, put her in another home and sell it to . . . Sacred Heart [University], and if the Union got in, he would pay top lawyers to threaten them from coming in.” She could not recall anything else from the meeting at that time. On

²⁸ Thompson corroborated Williams regarding Williams speaking out at the meeting.

²⁹ Williams and Thompson, who work on the same shift as Needham, testified that they attended the morning meeting. Wright attended a meeting for nightshift employees at 4 a.m. and Dyer attended an evening shift meeting. Stewart testified that there were no nursing department employees at the meeting she attended.

cross-examination, Needham, while acknowledging that Glickman said much more about the Union than she recalled on direct, denied that Glickman said he had heard that the Union was going to demand a \$2-hour raise or that, if he had to negotiate with the Union, he would instruct his negotiators not to agree to a deal that would not be good for the home. She also denied that he even talked about negotiating a contract or bargaining in the context of shutting down the home. She did acknowledge, on cross-examination, that Glickman talked about the Respondent losing money and not having much money in the budget. According to Needham, this was the first time she had heard that the Respondent was having money problems. On redirect, Needham testified that Glickman told the employees that “he would pay a sh—load of money to top lawyers so the union can’t come in but there won’t be no negotiations, that the union is not coming in.” After reviewing the affidavit she gave on April 5, shortly after Glickman’s meeting, she recalled further that Glickman said, if there was a union contract, the Respondent would cut staff. She testified that it was clear in her mind that Glickman used the word “would” when speaking about shutting down and cutting staff.

Glickman testified that the theme of his first series of meetings in early April was to introduce himself to the employees, to educate them about the Respondent’s financial situation, and to describe to them how the Respondent would have to react to unfair demands from the Union, should the employees vote in favor of representation. In explaining the Respondent’s financial condition, Glickman told the employees that the Respondent had been losing money for several years and that the losses were increasing. He attributed these losses to the failure of the State and Federal governments to increase Medicare/Medicaid reimbursement rates. Glickman told the employees that, because the Respondent was primarily dependent on these government payments for its revenue, the Respondent was unable to keep up with its operating costs that were rising at a much faster rate. Glickman admitted telling the employees that the only way it could prevent losses was to cut costs and that 80 percent of its costs were people, i.e., labor costs. According to Glickman, he told the employees that the Respondent had been reluctant to take this step because it did not want to reduce the quality of care provided to the residents, something Glickman said that the Respondent was proud of. Glickman ended this portion of his speech by telling the employees that, because of these financial considerations, the Respondent was not in a position to meet the demands that the Union was advising employees to pursue by becoming organized. Glickman testified that he based these comments on information being circulated by the Union that the Respondent’s wages were out of line with the competition by about \$2 an hour. Glickman then told the employees, “[W]e could solve our problems with our employees without the help of the Union . . . we can solve our problems by working directly with them better than through a union, which was making promises it couldn’t keep.”

Glickman testified further that after describing the Respondent’s financial situation and its impact on union bargaining demands he told the employees what could happen in bargaining. According to Glickman, he told the employees that although the Respondent couldn’t afford the Union’s demands it

would bargain in good faith. He told the employees that if the employees selected the Union to represent them he would be directing the professionals hired by Respondent to conduct the negotiations. He told the employees that if the parties couldn’t agree in negotiations several things could happen. He said the employees could go on strike. If that happened, he told the employees that the Respondent would have to continue caring for its residents and would do whatever was necessary to deliver care. According to Glickman, he then told the employees what would happen if the Respondent met the Union’s economic demands. Glickman told the employees that the Respondent

would then proceed to change our quality of care. To undoubtedly reduce the number of employees, which would mean greater work loads for the remaining employees. We would of course seek efficiencies but we knew we could not make up for the additional losses by efficiencies since that’s what we’ve already been pursuing [I]f we were cutting the number of employees and quality of care to clients we would become very much like many of the other homes that have ended up with financial problems. The union homes in particular. And that people, like my mother who happens to be in the home, has a family that probably would not want her to be in the home. If the quality of care declined, we’d take her out. There are other board members who have family and would probably make the same decisions.

If directors were taking their family members out of the home undoubtedly other people would be doing the same. And if the reputation of the home declined to such a point where people actually were leaving then in all probability we would have difficulty filling beds with new residents. In that case we would essentially be approaching bankruptcy and would either voluntarily close or just be forced to close.

Glickman testified that he ended this presentation by telling the employees that, “by voting against the Union and working with management to resolve the problems, by allowing the Respondent to provide wage increases based on market conditions, we could probably solve the problems together.”

Glickman testified that he held the second set of meetings in response to union propaganda that “mischaracterized” his statements at the first meeting, with the Union telling employees that he had said the Respondent would close if there was a union. Glickman testified further that at the second meeting he spoke to the employees after Magid had spoken and after a video was shown in which employees who had been on strike at another 1199 facility were interviewed about their experiences. Glickman testified that he made three points at these meetings: (1) he addressed the “sad conditions” people in the video described, telling the Respondent’s employees that they could face the same conditions in a strike by voting for the Union and pursuing unreasonable economic demands; (2) he reviewed the Respondent’s financial condition again, telling employees why the Respondent could not meet unreasonable union economic demands and that if negotiations were unsuccessful the employees might end up on strike like the employees in the video; and (3) he reiterated his previous statements, telling the em-

ployees that what the Union was claiming he said was untrue, that he didn't say those things because he knew it was illegal, and he couldn't say that Respondent would shut down if there was a union. He told the employees that what he had done was to point out to them the circumstances under which it could in fact happen. Glickman ended the meeting by asking the employees to vote against the Union.

After testifying in a narrative fashion regarding the meetings, Glickman then denied, in response to a series of leading questions, that he made the statements attributed to him by the General Counsel's witnesses. On cross-examination, Glickman conceded that because he did not use a script or read from notes his statements to the employees varied from one meeting to the next. He also conceded that he could not testify as to the exact words he had used at each meeting because of this. Glickman testified that he did receive advice before the meetings about what he could and could not say and that he was careful, in choosing his words, to avoid committing any unfair labor practice. Glickman also admitted, on cross-examination, that he referred to the homes listed on the Respondent's posters as having closed or gone bankrupt, telling the employees that these were all union homes. Glickman also admitted that at the time he gave these speeches to the employees the Union had made no economic demands on the Respondent and that he did not know what the Union would demand in bargaining if it won the election. Glickman also described himself, in response to a question from the Charging party's counsel about his background, as having been involved in "turnaround situations." Glickman acknowledged telling employees this and explaining to them what a "turnaround" is. Glickman further acknowledged that employees were not permitted to ask questions at these meetings but that some employees did speak out anyway.

Glickman's narrative testimony about the two meetings he held, in contrast to his responses to leading questions from his own counsel, tended to corroborate much of the testimony of the General Counsel's witnesses. For example, Glickman's description of his background in "turnaround situations" supports the testimony of Thompson that he told the employees he was like a doctor for sick businesses. He admitted asking the employees, as the General Counsel's witnesses recalled, to give the Respondent a chance. He also acknowledged telling employees that he would take his mother out of the home if the quality of care diminished, that other residents' families would probably do the same and that, if enough did so, the Respondent would be on the road to bankruptcy or closure. Although the employees' recollections may have differed regarding his precise phraseology, he clearly made those points in the context of discussing what would happen if the employees elected union representation. Similarly, although he and the General Counsel's witnesses may disagree as to the manner in which he phrased it, it is apparent that he did indicate to the employees that the Respondent would not agree to a proposal to raise their wages by \$2 an hour and that he would hire "professionals" to make sure the Respondent did not agree to such a demand. It is also clear, regardless of the terminology used, that he predicted that the Respondent's agreement to such a demand would set in motion a chain of events leading to the ultimate closure of the home. I also note that Glickman essentially agreed with the

testimony of the General Counsel's witnesses regarding the mechanics of the meetings, i.e., the absence of a written speech, no opportunity for questions, employees nonetheless speaking out of turn, the presentation of a video at one of the two sets of meetings.

I have previously found that Williams and Thompson were generally credible witnesses. They, along with Lozada, Needham and Wright, are still employed by the Respondent. Their testimony is thus inherently reliable. *Flexsteel Industries*, 316 NLRB 745 (1995). Moreover, any variation among the witnesses is understandable in light of the fact that they were at different meetings and in light of Glickman's acknowledgement that he did not say the exact same thing at each meeting. Variations in the testimony of the General Counsel's witnesses and Glickman is also understandable in light of the fact that they were recalling what happened at these meetings from different perspectives and in the context of different life experiences. Finally, as noted above, Glickman essentially corroborated the key elements of the testimony of the General Counsel's witnesses to the extent necessary to resolve the issues raised by the complaint. I thus find, to the extent there is any material conflict in the testimony, that the recollection of the General Counsel's witnesses is more credible.

The Board and the courts have frequently addressed speeches and campaign posters similar to those at issue here. The decisional precedent reflects a constant struggle to balance the 8(c) right of an employer to make his views known and the right of employees to make their decision free from unlawful threats and intimidation. The fact that an employer does not directly threaten employees with plant closure or job loss is not the end of the inquiry. As the Supreme Court itself has recognized, any balancing of these competing interests "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of their relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Under *Gissel*, when an employer makes a prediction regarding the consequences of unionization,

the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based upon available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

Id. at 618. See also *NLRB v. St. Francis Healthcare Center*, 212 F.3d 945, 954-955 (6th Cir. 2000); *Times-Herald Record*, 334 NLRB 350 (2001); *Wallace International de Puerto Rico*, 328 NLRB 29 (1999); *SPX Corp.*, 320 NLRB 219, 221 (1995). Cf. *Savers*, 337 NLRB 1039 (2002).

The Board, in *Quamco, Inc.*,³⁰ found unlawful an employer's campaign tactic of displaying a "UAW Wall of Shame," con-

³⁰ 325 NLRB 222 (1997).

sisting of tombstones with the name of a closed factory where the UAW had represented employees, adding one a day leading up to the posting of a tombstone bearing the name of the employer with a question mark the day before the election. The Board held that “the logical inference to be drawn from the expanding cemetery of UAW-represented plants is that the same fate of plant closure and job loss awaited *Eldorado*.” Id. at 223. The Board held further that “the clear implication of the display [of the final tombstone] was that the fate of the plant would be thrown into question if, and only if, the employees chose union representation.” Id. See also *Laser Tool, Inc.*, 320 NLRB 105 (1995) (employer’s poster depicting four or five UAW strikers in front of a factory building displaying a “closed banner,” with the legend “Do you want this to happen to you? Vote No,” violated Section 8(a)(1)).³¹

The General Counsel argues that Magid’s and Glickman’s statements in meetings with employees, together with the poster and leaflet, conveyed the clear message to the employees that a vote for the Union would result in closure of the facility and loss of employees’ jobs. *Times-Herald Record*, 334 NLRB supra at 351 fn. 8 (an employer’s letter to employees equating a vote for the union with a vote for job insecurity violated Section 8(a)(1)); *SPX Corp.*, supra (cumulative effect of the Respondent’s campaign had reasonable tendency to convey the message to employees that job loss would result from their vote for union representation). The Respondent, on the other hand, argues that all of the statements were protected under Section 8(c) of the Act. In the Respondent’s view, it did no more than communicate to employees the fact that, in light of its financial situation, the Respondent would not be able to meet the Union’s publicized economic demands which, if agreed to, would threaten the continued viability of the home, possibly leading to its closure. The Respondent contends that these statements clearly indicated to employees that any closure or job loss following selection of the Union would be economically driven and not retaliatory. *Savers*, supra; *Clintonville Shoe Co.*, 272 NLRB 609 (1984).

While not free from doubt, I find that the Respondent here crossed the line between a permissible prediction of the economic consequences of unionization and an unlawful threat of plant closure and job loss. Although the poster and leaflet, on their face, may not have directly threatened such a result, particularly because of the disclaimer at the bottom, when considered in the context of what Magid and Glickman told the employees at the meetings, they were unlawful. The clear message the Respondent conveyed through this campaign was that union representation would lead to job insecurity. Glickman, in his meetings, said as much. Thus, despite the Respondent’s

financial situation, which would be no different on the day after the election whether the Union won or lost, Glickman suggested that the Respondent would only work with the employees to solve its financial problems and avoid cutting staff if there were no union. Although Glickman attempted to blame “unreasonable union demands” for any actions it might take if the Union won, it is clear that whatever action Respondent took was within its control and discretion. In addition, notwithstanding union campaign propaganda regarding employees’ need for a \$2-raise, there is no evidence that the Union in fact would have sought a raise in that amount if it won the election. Nor is there any evidence that the Union would not have been willing to work with the Respondent to solve its economic problems, if warranted. Glickman essentially predicted dire consequences of unionization as if it had no choice in the matter, which simply is not true. Under the circumstances here, I find that the Respondent’s written and oral communications to the employees would lead the employees to reasonably believe that the Respondent would close the facility rather than deal with the Union if the employees voted for union representation. These communications thus violated Section 8(a)(1) of the Act as alleged in the complaint. *Federated Logistics & Operations*, 340 NLRB 255 (2003); *Times Herald Record*, supra; *SPX Corp.*, supra.

6. Miscellaneous 8(a)(1) allegations

The complaint alleges, at amended paragraph 8(e), that the Respondent’s supervisor, Laidlaw, threatened employees, in November 2001 with loss of benefits and jobs if they supported the Union. The General Counsel relies on the testimony of Lozada, described above, regarding statements Laidlaw made to employees during a meeting on the Tandet West unit sometime around late October 2001. This is the meeting at which, as found previously, Laidlaw unlawfully solicited employees to revoke union authorization cards they had signed. According to Lozada, Laidlaw told two employees with less than a year’s tenure that they would be the first to go if the Union got in because the Respondent would have to cut staff to meet union demands and any cuts would be by seniority. Lozada testified further that Laidlaw told her that she could lose all her sick time and vacation time that she had accumulated because “all that would go on the bargaining table.” In response to leading questions from the Respondent’s counsel, Laidlaw denied making the specific statements attributed to her by Lozada. She acknowledged speaking to employees at meetings on the units about benefits and seniority but claims she talked about these subjects in the context of describing the collective-bargaining process. According to Laidlaw, she could not have made any threats to the employees because she knew, from training she received, that she could not say these things.

I previously credited Lozada’s testimony regarding this meeting over Laidlaw’s testimony. I find that the threats Lozada attributed to Laidlaw are consistent with the general theme of the Respondent’s campaign. The evidence reviewed above shows that the Respondent, in speeches given by higher management officials to groups of employees, conveyed the message that the Respondent would be forced to reduce staff to meet union demands in bargaining. Laidlaw’s statement that

³¹ In other cases, posters depicting closed factories under the question “Is this what the Union calls job security?” have been found lawful. *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993), enf. in relevant part 31 F.3d 79 (2d Cir. 1994); *EDP Medical Computer Systems*, 284 NLRB 1232 (1987). In these two cases, the complaint allegations regarding the posters were dismissed by the respective administrative law judge, without comment by the Board. Because it is unclear from the Board’s decisions whether the General Counsel even took exception to these particular findings, the decisions are of limited precedential value.

those cuts would be done by seniority and the two relatively new CNAs would be the first to go was coercive because not based on any objectively demonstrable facts. This statement was thus unlawful. I do not find Laidlaw's statement to Lozada, that she could lose accrued vacation and sick time, unlawful. Lozada conceded on cross-examination that Laidlaw said she could lose these benefits only as the result of bargaining, not that the Respondent would take them away unilaterally in response to a union victory. Accordingly, I find that the Respondent violated Section 8(a)(1) only with respect to Laidlaw's threat that the two new employees would lose their jobs if the Union were voted in.

The complaint alleges additional independent violations of Section 8(a)(1) committed by Laidlaw, Magid, and Pryor. These allegations all involve interactions between the alleged supervisors and either Dyer or Gauthier. Because these allegations are relevant to consideration of the 8(a)(3) allegations involving Dyer and Gauthier, they will be discussed in that section of this decision.³²

C. The 8(a)(3) Allegations

1. Juan Ayala

Juan Ayala had been employed by the Respondent for more than 10 years at the time of the hearing. He is a part-time dietary aide classified as a floater. In that position, Ayala performs different tasks within the dietary department. His immediate supervisors at the time of the organizing drive were Wargo and Erickson. Brian Cullen is the supervisor responsible for preparing the schedule. Ayala, who has a B.A. in foreign languages and has been certified to teach Spanish since 1998, was going to school at the time of the organizing campaign to become a registered nurse. In the fall 2001, Ayala worked weekends and 2 days during the week, usually Mondays and Tuesdays, so that he could take classes the rest of the week. There is no dispute that Ayala has been considered a good employee throughout his tenure with the Respondent.

Ayala signed a union authorization card on September 29, 2001. He was one of the first to show his support for the Union. According to Ayala, he spoke to other employees about joining the Union, solicited at least one card, and regularly leafleted outside the cafeteria door and at the bottom of the hill. He appears in a picture with other union supporters on a leaflet distributed by the Union during the preelection campaign in March, entitled, "What does the Future Hold?" Ayala is the only male employee in the photograph. Ayala testified that he spoke up at one of the meetings the Respondent required its employees to attend that were conducted by its outside consultant, Direct Labor Training. According to Ayala, when the gentleman conducting the meeting told the assembled employees that he was being paid by the Respondent and would be impar-

tial, Ayala asked how could he be impartial if the Respondent was paying him. No supervisors employed by the Respondent were at this meeting. There is no dispute that the Respondent was aware of his support for the Union. As discussed above, Wargo unlawfully directed Ayala, in early March, not to talk about the Union while working.

Ayala testified that, in December 2001, he submitted his request to Cullen for the days off he wanted in order to accommodate his course schedule in the upcoming semester. Cullen told him there would be no problem and honored his request for the first 4 weeks of the semester. According to Ayala, Cullen stopped honoring his request for days off after the Union's community election, February 27. When Ayala asked Cullen why he was doing this, Cullen told Ayala he had only approved the request for 2 specific days, not the entire schedule. Ayala pointed out that Cullen had been honoring this request for 4 weeks. Ayala did not testify as to Cullen's response to this statement. Ayala testified further that, also after the community election, Cullen started assigning him to strip trucks more often. As Ayala described this work, it was one of the most undesirable tasks in the dietary department. According to Ayala, because of his relative seniority in the department, he had rarely been assigned such dirty and menial tasks before. When Ayala asked Cullen about this change, Cullen responded, with a smirk, "I put my best people on trucks." Ayala recalled that his increased assignment to stripping trucks lasted for 3-4 months until Cullen reverted to assigning him a variety of tasks. The work schedules in evidence substantially support Ayala's testimony. They show that, at least from about mid-March through mid-June, Ayala was assigned to truck duty at least 3 out of the 4 days he worked each week. In some weeks, that was the only assignment he received. In contrast, the schedules for January and February show some weeks when he was not assigned to strip trucks at all, and other weeks when it would be only 1 day.

Ayala testified further that, at some point in 2002, he needed a recommendation from his current employer to enter nursing school. He first asked his immediate supervisor, Erickson, who had given him a similar recommendation about 2 years earlier for a teaching job. According to Ayala, this time Erickson told him she had to talk to the director of the department, Tim Horan, before she could do it. When Ayala asked her later the same day if she had talked to Horan, Erickson told him that Horan said Ayala had to sign a waiver on the recommendation form, giving up his right to see the recommendation. When Ayala told Erickson he would not sign the waiver, she told him she would talk to Horan. When Ayala saw Horan later, he asked him about the recommendation. According to Ayala, Horan at first told Ayala he would give him the recommendation the next day. The next day, Horan called Ayala into his office and told him he could not give him the recommendation. Ayala testified that Horan said, "To be honest, I cannot give you the recommendation because, what am I going to put here where the person says 'intelligence and communication skills'? You do not have any." Ayala testified that, because there was nothing for him to say at that point, he left Horan's office without saying anything further. According to Ayala, he then asked Caplan, Horan's assistant who had given Ayala a recommendation for another matter previously, if he would fill out the form

³² The General Counsel offered evidence at the hearing about actions taken by the Respondent in response to a petition submitted by CNAs on the night shift complaining of unfair and discriminatory treatment by a supervisor. In his posthearing brief, the General Counsel does not cite this evidence as supporting any of the allegations in the complaint. I have not been able to find any complaint allegations that specifically address this event. Accordingly, I shall make no findings regarding the matter.

for nursing school. Caplan replied that he could not because “his job was on the line.” When Ayala asked Caplan if he could use the letter of recommendation Caplan previously wrote, Caplan said, okay. Ayala testified that he had asked Caplan for the earlier recommendation because Horan was away at that time. According to Ayala, when Horan returned, he asked Ayala why he hadn’t asked Horan to give him a recommendation, telling Ayala that he would have been glad to give him one.

Cullen testified for the Respondent and disputed Ayala’s testimony regarding the scheduling issue. Cullen acknowledged speaking to Ayala about his schedule around January 2002. According to Cullen, he spoke to a number of part-timers who were in school about their schedules around that time because it had come to his attention that some of the employees who claimed to be in school at certain times were not. Ayala was one of these employees. Cullen testified further that part-time employees usually give him their course schedules at the beginning of each semester. Cullen testified further that when he asked Ayala why his school course schedule showed he had no classes on one of the days off he requested, Ayala told him he needed the extra day to study. Cullen told Ayala he would try to accommodate the request. He then asked Ayala if he would work if he needed him to work that extra day off. Cullen testified that Ayala said he would.³³ According to Cullen, he tried to accommodate Ayala’s requested schedule thereafter and had no further discussions with him about this subject.

Cullen testified that when he makes up the schedule he also decides what job each employee will be doing. According to Cullen, he bases his work assignments on which employee has the most skill at a particular task. Cullen recalled having one conversation with Ayala about his work assignment. Ayala asked him about a “pattern” of being assigned to trucks. Cullen testified that he told Ayala that this was because Ayala “was the most knowledgeable of this position.” Significantly, Cullen did not attempt to disabuse Ayala of the notion that there was such a pattern of assignments. Cullen could not recall when this conversation occurred other than it was around the same time as the earlier discussion about Ayala’s school schedule. Cullen admitted learning of Ayala’s support for the Union long before these conversations. While acknowledging there are some positions in the department that are less desirable than others, Cullen claimed that stripping trucks is not the most undesirable task. Cullen considered being assigned to the dish room or pots and pans as less desirable. Cullen also testified that an employee assigned to trucks does not strip trucks all day. They only have to do this twice a day, about 45 minutes each time, with the remainder of the shift spent doing nourishments and working the tray line.

Horan disputed Ayala’s testimony about his request for a recommendation. According to Horan, it was Ayala who approached him directly, asking him to fill out a recommendation form for nursing school. Horan did not recall any involvement by Erickson in this matter. Horan testified that he asked Ayala

if he was willing to sign the waiver on the form so that Horan could send it directly to the school. Ayala told Horan he would rather get the form back and mail it himself. Horan told Ayala to leave the form with him and he would take a look at it. Horan testified further that he called Ayala into his office a day or two later, after having reviewed the recommendation form, and told Ayala he had concerns about the nature of the recommendation sought. According to Horan, he told Ayala that the form looked like a personal reference, not a typical employment reference, because it asked for comments about Ayala’s integrity, character, etc. He told Ayala that he might be better off asking someone who knew him better to complete the form. Horan testified that he had never done this type of “personal reference” for any other employee in the department. According to Horan, after he said this, Ayala said okay and left with the form. Horan denied saying anything to Ayala about his intelligence or communication skills. Horan also denied being aware that Ayala had gotten references or recommendations from Erickson and Caplan in the past.

Caplan admitted having a conversation with Ayala, sometime in the spring of 2002, about a recommendation. Caplan recalled Ayala telling him that he had asked Horan for a recommendation and been denied. He recalled Ayala asking him for a recommendation. According to Caplan, he told Ayala that if he had an issue with the director over a recommendation, to take it up with the director. He denied telling Ayala that he could not give Ayala a recommendation because “his job was on the line.” Caplan denied being aware that Ayala was a union supporter. He also denied, incredibly, being aware of any interest in the Union among the employees in the dietary department, despite the fact that Stewart, one of the core group of employee union activists, also worked in the department, and contrary to the testimony of other department supervisors that they were aware of such support. On cross-examination, Caplan admitted providing a “personal recommendation” for Ayala, in 1998, when Ayala was seeking a position as a teacher’s aide. He also contradicted his direct testimony when he denied, on cross-examination, that Ayala asked him for a recommendation in 2002. Erickson was not asked any questions by the Respondent about her involvement in Ayala’s request for a recommendation.

The complaint alleges, at paragraph 27, that the Respondent imposed more onerous working conditions on Ayala on or about February 28, 2002, and, at paragraph 28, that the Respondent refused to supply Ayala with a recommendation on or about March 15, 2002. Paragraph 34 alleges that the Respondent was motivated in taking these actions by Ayala’s having joined, supported, and assisted the Union. The Respondent denies that it imposed more onerous working conditions on Ayala and denies any unlawful motivation behind its treatment of Ayala. The test for determining whether the Respondent’s actions involving Ayala and the other alleged discriminatees violated Section 8(a)(3) is the Board’s *Wright Line* test.³⁴ Under this test, the General Counsel bears the initial burden of

³³ On cross-examination, Ayala had acknowledged being asked for a copy of his course schedule but denied that Cullen pointed out any discrepancy between his course schedule and his requested days off.

³⁴ *Wright Line*, 251 NLRB 1083 (1980), enf’d, 662 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 989 (1982). See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

proving by a preponderance of the evidence that protected activity was a motivating factor in the employer's actions. To meet this burden, the General Counsel must offer evidence of union or other protected activity, employer knowledge of this activity, and the existence of antiunion animus that motivated the employer to take the action it did. The Board has recognized that direct evidence of an unlawful motivation is rarely available. The General Counsel may meet his burden through circumstantial evidence, such as timing and disparate treatment, from which an unlawful motive may be inferred. See *Naomi Knitting Plant*, 328 NLRB 1279 (1999), and cases cited therein. If the General Counsel meets his burden, then the burden shifts to the respondent to prove, by a preponderance of the evidence, that it would have taken the same action, or made the same decision, even in the absence of protected activity.

I find, based on Ayala's credible testimony, as substantiated by the work schedules in evidence, that Cullen did increase the regularity of assigning Ayala to "trucks" after the Union filed its petition on March 1. I note that Cullen implicitly admitted this was the case when Ayala questioned him about this pattern of work assignments. Rather than telling Ayala that he was not assigning him to trucks any more than he had before, he simply responded, "I put my best people on trucks." This sarcastic response confirms that a change had taken place because, if that were truly the case, why hadn't Ayala, one of Cullen's best people, been put on trucks so regularly before? With respect to the denial of a recommendation, the facts are largely undisputed. Horan admitted he refused to give Ayala a recommendation, attempting to justify this refusal by making a distinction between a "personal reference" and an "employment reference." This distinction ignores the fact that at least one of Ayala's supervisors, Caplan, admittedly did not have a problem giving such a "personal" reference before the onset of union activity, even though Caplan did not really know Ayala outside the work environment.

The evidence described above clearly establishes that the Respondent was aware of Ayala's union activity at the time of the alleged discriminatory actions. The 8(a)(1) violations found above, and in particular, Wargo's overly broad restriction of Ayala's right to talk about the Union with his coworkers, establishes the requisite element of animus. Circumstantial evidence, such as the timing of the Respondent's actions, taken during the critical preelection period between the Union's petition and the election, supports a finding that Ayala's union activities and the Respondent's animus toward such activity motivated its supervisors to schedule Ayala to do the unpleasant task of stripping trucks more often than before and to deny him a recommendation for nursing school. I find that the General Counsel has established, by a preponderance of the evidence, that antiunion animus motivated the Respondent's treatment of Ayala, shifting the burden to the Respondent to prove, by the same preponderance, that Ayala would have been assigned to strip trucks as often and would have been denied a recommendation had there been no union activity.

The Respondent's defense to the first allegation is that stripping trucks is really not that onerous a task and that, as a part-timer, Ayala could be assigned wherever he was needed. While these assertions may be true, the Respondent's own witnesses

acknowledged that many employees do not like being assigned to trucks. Ayala's complaint about this assignment would have put Cullen on notice that Ayala did not like this work. Nevertheless, he continued to assign this unpleasant task even though Ayala was perhaps one of the most experienced employees in the department and recognized as a good employee. Ordinarily, an employer would be expected to accommodate such an employee and not intentionally assign them work they did not like to do. The fact that the Respondent chose not to do so during the union campaign, when it had done so in the past, shows that the assignment was vindictive. Similarly, with respect to the denial of a recommendation, there is no dispute that Ayala had received similar recommendations before from other supervisors. Only after he displayed his open support for the Union did it become a problem for Horan to provide a recommendation for Ayala. Although Horan claimed that he declined to provide this recommendation because it was "personal" in nature and he did not know Ayala well enough to evaluate his judgment, integrity, character, etc., I credit Ayala's version of the conversation, which shows that Horan made a point of insulting Ayala when he denied the request. Even if Horan had legitimate concerns about his ability to evaluate Ayala on certain criteria, he could have completed the form, noting these limitations, without insulting Ayala. Accordingly, I find that the Respondent has not met its *Wright Line* burden and that the General Counsel has established the merits of the allegations of the complaint as to Ayala.

2. Misty Hinds

Hinds was hired by the Respondent on July 23, 2001. She worked full time as a CNA on second shift. Straubel was her supervisor. Hinds learned of the Union's organizing drive soon after it started and was one of the first employees to sign an authorization card, on September 27, 2001. Hinds testified that, after signing the card, she attended union meetings off-site, voted in the February 27 community election in the commuter parking lot, handed out union leaflets on her unit and spoke to coworkers. She did not identify any supervisory or management employees who may have seen her doing this.

On January 26, Hinds was injured in an automobile accident. After seeing her doctor, she spoke to DiGangi, the head of the nursing department, about her need to stay out of work for at least 2 weeks. DiGangi approved her request for leave and, on February 8, a letter signed by Linda Silverberg, human resources assistant, confirmed this, as follows:

As we discussed, since you do not meet the requirements to be eligible for Family Medical Leave, the Jewish Home is prepared to grant you a compassionate leave. The criteria for family medical leave is that you are employed for one year in conjunction with working 1000 hours. Therefore, under the policies of the Jewish Home you will be placed on a compassionate leave effective February 5, 2002.

During this leave, you will need to maintain contact with Linda DiGangi, Assistant Director of Patient Services or a member of the Human Resources Department.

It is our hope that your physician will clear you to return to work fit for full duty without restrictions effective

on February 22, 2002. (Since you will be going to your physician on February 21, 2002). If you are unable to return on or before February 22, 2002 please notify Human Resources and your last date of employment will be recorded as February 8, 2002 which was your last day worked. Unfortunately, we cannot extend any more leave under the Jewish Home's policies.

Although there is no guarantee you will be rehired, when you are prepared to return to work, you may apply for any available position.

Hinds testified that she had not heard of "compassionate leave" before receiving this letter. Hinds testified further that she did not recall DiGangi telling her that she was not eligible for family medical leave. She also did not recall discussing this with Silverberg despite what the letter indicates.

Hinds testified that her doctor released her to return to work on February 22 and she returned to work that date, as required by the letter from Silverberg.³⁵ According to Hinds, on her first day back, she was told to attend a meeting in the recreation room in Tandet building. When she got to the meeting, it had already started. There were a number of CNAs and housekeeping employees there as well as DiGangi. Hinds asked what the meeting was about. The gentleman from DLT who was conducting the meeting told her she was late. He then introduced himself and said he was not from the Respondent and he was not from the union. Hinds then asked why he was there. The man replied that he was there because a few of the employees did not understand or speak English. Hinds then got up and said, if they don't understand English, why is he speaking English. She also asked why was she there because she spoke and understood English. The man repeated that he was there because some of the employees didn't understand English and he then started talking about how the Union isn't everything it's set out to be. Hinds again interrupted him, asking why should she be here since she didn't have any problem understanding. She said she had better things to do, that she hadn't finished her PM care for her residents. According to Hinds, other CNAs started speaking out saying the same thing she had. Gradually, Hinds and the others started walking out of the meeting until no one was left to listen to the man. Hinds testified that, during her exchange with the man, DiGangi appeared irritated, pacing and clicking her pen.

Hinds testified that she had another accident at the end of February, injuring her toe on a medicine cart, which exacerbated a preexisting condition. She called her doctor, who recommended that she have surgery. Her doctor asked Hinds to fax him her medical information. After speaking to her doctor, Hinds went into work early and asked a nurse who worked the day shift on the Kuriansky-3 unit, whom she knew only by the first name as Elaine or Irene, to fax the insurance information to her doctor. According to Hinds, this nurse said she would fax the information if Hinds agreed to say, "no." When Hinds asked, "[S]ay no to what?" the nurse replied, "[S]ay no to the

Union." This nurse then talked to Hinds for about 20–25 minutes about what the Union had done at another facility, Mediplex. Hinds admitted that she listened to the nurse but did not reveal her own pronoun sympathies during this conversation.

On March 12, her day off, Hinds had surgery on her toe. She expected to be able to return to work but was told by her doctor that she needed to be off her feet for 5–7 days. There is no dispute that Hinds submitted a note from the Doctor to that effect to the human resources department the same day. Hinds testified that she received a call from someone in the nursing department the next morning telling her, "[T]his is a courtesy call. You're terminated." When Hinds expressed incredulity, the woman on the other end of the line said, "Yes, we can't afford to give you a week off after what you already had with the accident." The woman told Hinds she could reapply when she felt better if the Respondent had the position available. Hinds was told she would receive something in the mail. Sometime after this phone call, Hinds received a letter from the Respondent, signed by Silverberg and dated March 13, stating the following:

I was sorry to hear that you had surgery and will not be able to return to work at this time. I certainly understand your need to stay home and recuperate from your surgery.

As I explained regarding your leave of February 8th, the Jewish Home makes every effort to work with employees who do not qualify for a leave of absence under the Family Medical Leave Act by granting you a two week Compassionate Leave.

Since you have already exhausted your 2 weeks compassionate leave and you have informed me that you will not be returning to work at this time, your last day of actual work (March 9, 2002) will be listed as the date your employment ended.

Although there is no guarantee that you will be rehired, when you are prepared to return to work, you may reapply if an opening is available.

Hinds testified that she reapplied for employment, as instructed in the letter, but was never called by the Respondent for a job. On the day of the election, April 11, while visiting a friend at the home, Hinds saw a posting for a 40-hour position. According to Hinds, she called the Respondent's human resources department about this opening. Hinds testified that she spoke to Jacqueline Solomon, the person in human resources who had interviewed her when she was hired in July 2001. When Hinds asked Solomon about a job, Solomon said there were no openings. Hinds then asked her directly about the posting. According to Hinds, Solomon said, "[T]hey're not going to re-hire you because you've already been terminated."

The Respondent called two witnesses to rebut the allegation regarding Hinds' termination. Eileen Potkay, an LPN who works the day shift on the Kuriansky-3 unit where Hinds worked the evening shift in March, was called to rebut Hinds' testimony regarding her interaction with a nurse she knew only as Elaine or Irene. Potkay testified that she was familiar with Hinds as a CNA who worked on her floor. She testified that she was not a charge nurse but did oversee the unit if the nurse manager or assistant nurse manager were not around. Accord-

³⁵ Hinds testified that her doctor initially told her to stay out of work longer. He changed her return to work date after she told him about the letter she had received from the Respondent, requiring her to return no later than February 22.

ing to Potkay, the only conversations she would have had with Hinds in March were about patient care. Potkay specifically denied talking to Hinds about the Union and specifically denied speaking to Hinds about her medical condition. Potkay could not recall ever being asked by Hinds to fax anything to her doctor and she “absolutely did not” tell Hinds she would fax something or do anything else for her if Hinds voted against the Union. Potkay acknowledged having worked previously in an 1199 facility where the number of CNAs was cut in half. She admitted talking about her experiences at that facility with the employees who worked on her shift. Because Hinds did not work on her shift, she never shared these experiences with her.

The Respondent also called Sonceria Jackson-Holland, who is employed by the Respondent as a senior human resources administrator responsible for recruitment, orientation, HR information systems, and assisting managers and employees with questions and problems. She testified that she made the decision to terminate Hinds’ employment. Although Jackson-Holland has been employed by the Respondent for 13 years, she was absent from the facility on maternity leave during part of this union campaign, from December 15, 2001, until March 7, 2002. She testified that she became involved in Hinds case soon after returning to work when Silverberg, who works under her supervision, brought the matter to her attention. According to Jackson-Holland, Silverberg informed her that Hinds had been granted compassionate leave but used it up and now was seeking more leave. Jackson-Holland instructed Silverberg to draft the March 13 letter, terminating Hinds’ employment, and she reviewed it before it issued.³⁶ Jackson-Holland also testified that she had a telephone conversation with Hinds in March in which she explained to Hinds the Respondent’s compassionate leave policy. According to Jackson-Holland, when Hinds’ asked if she was being fired, Jackson-Holland replied, “[W]e’re not firing you. We have a job available but you can’t work. But, as you learned on orientation, you can re-apply. If there is an opening, you may be re-hired but there is no guarantee.” Jackson-Holland testified that she did not believe that Hinds ever reapplied for a job.³⁷ She also denied knowledge of Hinds’ union activities or support.

Jackson-Holland also testified regarding the Respondent’s leave policies. She claimed that the Respondent only provides a maximum of 2-weeks “compassionate leave” to employees who do not meet the eligibility requirements for FMLA leave, i.e., employment for 1 year and at least 1000–1250 hours worked preceding the leave. She testified further that the Respondent automatically terminates employees at the end of their leave if they are unable to return to work. She cited three examples of employees treated similarly to Hinds. The documents offered to support this testimony are status change forms indicating that each of the three employees was terminated, on April 5, October 2, and November 1, 2001, respectively, for the stated reason that they were unable to work at the conclusion of their “compassionate leave.” Attached to the forms are copies

of letters sent to each of the employees, which are identical to one another, advising them that they had been granted “a one-time compassionate leave of up to two weeks” and that, if unable to return at the end of that leave, they would be considered to have voluntarily terminated their employment but could re-apply. All three letters are signed by Silverberg. The two letters Silverberg sent to Hinds, on February 8 and March 13, while worded differently and containing additional verbiage, essentially communicate the same information, i.e., that the Respondent was granting, or had granted, her 2 weeks’ compassionate leave on February 8, that no further leave could be extended, and that if she was unable to work beyond the 2 weeks, she would be considered terminated.

Documents offered into evidence by the General Counsel show that the Respondent provides several types of leave for its employees. An “Outline of Benefits,” with a date of September 2001, shows that, in addition to vacation, sick leave and personal days which employees begin to accrue after 6 months of continuous employment, employees are eligible for 26 weeks of short-term disability benefits “on the first of the month following three full months of employment.” The Respondent’s short-term disability policy requires a 7-day waiting period unless the disability is due to an accident. The Respondent’s employee handbook also describes the short-term disability plan. That section of the handbook describes the monetary benefit employees may receive under the plan and the process for filing a claim with the insurance company but refers to the “Leave of Absence” section of the handbook for “employees unable to work due to medical reasons for an extended period.” The “Leave of Absence” section of the handbook only describes FMLA and pregnancy leave and ends with the following paragraph:

In general, the Jewish Home will not grant more leave than is allowed under the Federal or State Family Medical Leave Acts. The Home does, however, reserve the right to grant leave under its internal disability leave policy. The total maximum leave granted in any year may not exceed 6 months. Business reasons may make it necessary to fill positions after the expiration of family medical leave. When applicable, the Home will make every effort to notify prior to filling your position.

The handbook does not explicitly mention “compassionate leave.” No other document memorializing the Respondent’s “compassionate leave policy” was offered into evidence by the Respondent.

The General Counsel, conceding that there is no direct evidence that the Respondent was aware of Hinds’ union support, argues that the Respondent’s knowledge and unlawful motivation may be inferred from circumstantial evidence. General Counsel suggests that motive may be inferred by the haste with which Hinds was terminated, the failure to consider whether she was eligible for short-term disability or some other form of leave, and the general antiunion animus evident from the unfair labor practice findings set forth above. I disagree. Knowledge is a key element in the General Counsel’s case that is missing here. Even crediting Hinds’ testimony about her actions at the meeting with the DLT representatives, there is no evidence that

³⁶ The Respondent did not call Silverberg as a witness.

³⁷ The Respondent did not call Jacqueline Solomon, whom it admitted in its answer was a statutory supervisor and agent, to rebut Hinds’ testimony that she did reapply and was told she would not be hired.

in expressing her frustration at attending a meeting she regarded as a waste of time, she communicated her pronoun sympathies. The testimony regarding the nurse who faxed her insurance information is too unreliable to establish knowledge. Not only was Hinds unable to identify who the nurse was, she could not testify in any detail as to the particular individual's supervisory or agency status. Assuming the evidence is sufficient to point to Potkay as the nurse in question, the Respondent has successfully rebutted this testimony through Potkay's credible denial that she had such an encounter with Hinds. I am also not persuaded by General Counsel's arguments that Hinds was treated differently from other employees who were not eligible for FMLA leave. The only examples in the record, all pre-dating Hinds' case, show no more than 2 weeks "compassionate leave" being granted with virtually automatic termination when the employee did not return after exhausting the 2 weeks' leave. All correspondence also indicates that this is a one-time benefit only. While the Respondent's policy may be harsh and unfair, there is insufficient evidence that the Respondent applied this policy in a discriminatory manner to terminate Hinds. I note, in particular, the absence of any evidence that Respondent permitted an employee who was not eligible for FMLA or pregnancy leave, to be out of work for more than 2 weeks.³⁸ Having found that the General Counsel did not present a prima facie case of a discriminatory motive behind Hinds' termination, I shall recommend dismissal of paragraph 29 of the complaint.³⁹

3. Farid Gauthier

Gauthier was hired as a shift leader in the Environmental Services Department on January 3, 2000. He worked second shift, from 3 to 11:30 p.m., during the week and on the day shift when he worked weekends. A total of seven employees worked the same shift as Gauthier in environmental services. Gauthier worked directly with a crew of four. Gauthier was hired by former Environmental Services Director Richard Bracci, who gave him a good evaluation and 3-percent merit raise after 1 year. Bracci left in mid-2001 and was replaced by Vidal Castrillon who also left the Respondent's employ, in late 2001. Kevin Pryor, the current director, started in January, in the midst of the Union's campaign.

Gauthier was one of the first employees to get involved with the union drive. He signed a card on September 28, 2001, attended meetings, spoke to other employees and obtained a number of cards from them, distributed leaflets at the main entrance to the Respondent's facility, and appeared in union literature distributed to employees and in the community. He

was with Tawana Williams and Ebonie Stewart on February 15 when Magid, Silverman, and Pryor evicted them from the cafeteria under the Respondent's unlawful no-access rule. Because of the highly visible nature of Gauthier's union activities, knowledge is essentially undisputed.

The Respondent contends that, as a shift leader, Gauthier was a supervisor within the meaning of the Act. Although it is undisputed that Gauthier did not have the authority to hire, fire, discipline, promote, transfer, or otherwise directly affect the tenure or status of employees working on his shift, the Respondent apparently relies on his direction and or assignment of work to other employees as establishing his supervisory status. The evidence in the record, however, reveals that the employees on Gauthier's crew occupied positions that defined their job duties. Moreover, Gauthier met at the start of the shift each day with admitted Supervisors Pryor, Candice Brooks, and Jose Valencia, who told him what needed to be done on his shift. At the end of the shift, Gauthier filled out a report indicating what tasks had been accomplished and noting any problems encountered. Although he could note problems he had with employees, Gauthier could not take any action against an employee and was not consulted by his supervisors regarding any discipline that might be imposed. Gauthier also had no authority to authorize the employees on his shift to work overtime if a task was not completed. In fact, he was issued a written warning by former Supervisor Jeff Long in March 2001 for "misuse of authority" when he allowed employees to work overtime. The record reveals that Gauthier was also responsible for filling out inventory sheets which, for the most part, simply recorded the amount of supplies on hand and whether additional supplies needed to be ordered based on predetermined amounts. He had no authority to order supplies himself, nor could he make any independent determination regarding the amount to be ordered. Gauthier was also responsible for filling out forms to document any work-related injury occurring on his shift and to record the times in and out when an employee forgot to punch his time-card.

None of the evidence in the record demonstrates the type of independent judgment in the exercise of the limited authority Gauthier had as a shift leader that would meet the statutory definition of a supervisor. See *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918 (6th Cir. 1991); *Somerset Welding & Steel*, 291 NLRB 913 (1988). Moreover, in contrast to other supervisors recognized by the Respondent, Gauthier was paid on an hourly basis, received hourly employees' benefits, performed work alongside his crew for most of the shift and was not invited to attend any of the training sessions or other meetings conducted by the Respondent for its supervisors during the union campaign. In fact, the Respondent did not treat Gauthier like a supervisor until it decided to fire him. Based on the preponderance of the evidence, I find that the Respondent has not met its heavy burden of proof that Gauthier was not entitled to the Act's protection as a statutory supervisor.⁴⁰ *Freeman Decorating Co.*, 330 NLRB 1143 (2000).

³⁸ This would exclude employees who were absent on accrued sick leave, vacation, or personal days since there is no evidence that Hinds had any accrued leave left to use on March 13.

³⁹ Hinds' testimony, that she re-applied and was not hired even though the Respondent had an opening for a CNA on or about April 11, was not contradicted by the Respondent. Although this might suggest that Hinds was being treated discriminatorily, the fact remains there is no evidence that Solomon, or anyone else in the Respondent's management, had any knowledge of Hinds' union sympathies. There is also no evidence that any other employee terminated for not returning from leave was subsequently rehired.

⁴⁰ As the party asserting supervisory status, the Respondent has the burden of proof on this issue. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001).

Gauthier testified that after he became involved with the Union Castrillon, the director at the time, called him into the office and told him that he should not be part of the Union. According to Gauthier, Castrillon told him the Union would strain their relationship, that it would not be good for Gauthier or the Respondent's employees. Gauthier testified further that Castrillon began to find fault with anything he did, leading to a written warning he received on December 19, 2001. The warning catalogues a litany of incidents of alleged unsatisfactory performance by Gauthier dating from October 8, 2001. Gauthier disputed the warning, contending that he was being held to a different standard from the other shift leader, Maria Labrada, and that the Respondent did not have adequate staffing to accomplish all the tasks assigned on his shift. Gauthier testified that, after receiving this warning, he went to see Vice President Silverman and asked for a meeting with his department head to address his concerns. Such a meeting was held within a week or two, in Silverman's office. During this meeting, according to Gauthier, Castrillon interrupted him while he was explaining the staffing problems to Silverman, and said, "[L]et's stop kidding ourselves here. Everybody knows you're one of the Union leaders." Gauthier recalled that Silverman appeared taken aback by Castrillon's statement and, when Castrillon started accusing Gauthier of calling his home and threatening Castrillon's wife, Silverman stopped the meeting, telling Gauthier and Castrillon that the meeting was going nowhere. Castrillon was replaced by Pryor not long after this meeting. Castrillon, who was no longer employed by the Respondent at the time of the hearing, was not called as a witness and Silverman, who testified for the Respondent, did not dispute Gauthier's testimony about this meeting.

On February 27, the day of the Union's community election, Gauthier leafleted at the bottom of the hill and gave employees rides to and from the commuter parking lot where the election was held. When he reported to work that afternoon, supervisors Brooks and Valencia expressed surprise that he was there, telling Gauthier that they thought he was not coming in that day. Gauthier testified that he had told Brooks sometime before February 27 that he might need to take that day off to pick up his brother at the airport if his brother decided to come for a visit. According to Gauthier, he also told Brooks that it would be a last-minute thing and that he might not call her until the last minute if he needed the day off. He testified that he also told Brooks that if he didn't call her it meant he would be coming into work. After reminding Brooks of this earlier conversation, Gauthier went to work. About 15 minutes later, Gauthier was paged by Silverman and told to meet him in the department office. When Gauthier got to the office, Silverman told him that there was a "discrepancy" on the schedule. He told Gauthier to punch out and go home and that if he had anything to say to Silverman to wait until the next day when he was on the clock. Gauthier did as he was told. Gauthier testified further that about a month before this, on January 30 Brooks also questioned what he was doing there when he reported for work. Brooks told him at that time that she thought he was off and that she had failed to schedule him. Rather than send him home, Brooks apologized for her mistake and Gauthier worked the shift.

The General Counsel alleges, at paragraph 27 of the complaint, that the Respondent violated Section 8(a)(3) of the Act by refusing to let Gauthier work on February 27. Brooks and Silverman testified for the Respondent regarding this allegation. Brooks, who impressed me as a credible witness, corroborated Gauthier to the extent that she acknowledged he asked her for a day off to pick up a relative at the airport several weeks before the day in question. However, Brooks did not recall there being anything contingent about Gauthier's request for the day off. She recalled further that Gauthier submitted a request form for the day off which she approved. Brooks testified that she wrote "holiday" on the schedule for Gauthier and assigned Labrada, the other shift leader who normally fills in on Gauthier's days off, to work that day. Brooks testified further that when Gauthier showed up for work on the day he had requested off she asked him what he was doing there. When Brooks reminded him of his request for the day off, Gauthier told her he forgot to tell her that he had changed his mind and no longer needed the day off. Brooks told Gauthier that he could not work because Labrada was already working the shift for him. Brooks acknowledged that she discussed the situation with Silverman and fellow Supervisor Valencia before telling Gauthier that he could not work. Silverman testified that Brooks called him and told him that Gauthier was in the building working on a day he was not scheduled to work. Silverman went to the environmental services office and met with Brooks and Valencia. After reviewing the schedule to verify that Gauthier was scheduled off, he spoke to Gauthier and asked him why he was working. Gauthier told Silverman that he was scheduled to work. When Silverman reminded Gauthier that he had asked for the day off, Gauthier acknowledged he had asked for the day off, mentioning his brother's visit, and said his plans had changed. Gauthier asked Silverman, "[W]hat's the big deal?" Silverman told Gauthier that the Respondent had already scheduled a replacement for him and didn't need him to work. When Gauthier asked Silverman if he was telling him to go home, Silverman said, yes. Silverman recalled that Gauthier acknowledged that he never told his supervisor that he had changed his mind after his day off had been approved. Silverman testified that he was unaware of an earlier incident in which Gauthier was permitted to work even though he was not on the schedule. Brooks had not been asked about this incident.

The evidence in the record clearly establishes that Gauthier was a leading union activist and that the Respondent was aware of this on February 27 when he was sent home. The unfair labor practices found above, and in particular the incident on February 15 when Gauthier was one of three off-duty employees evicted from the cafeteria where they were handing out union literature, establishes the Respondent's animus toward its employees' union activities. Gauthier was sent home within 2 weeks of this incident by Silverman, the same management representative who evicted him from the cafeteria. The day that Gauthier was not permitted to work is also the same day that the Union conducted its well-publicized community election. Based on these factors, as well as Gauthier's undisputed testimony that Brooks permitted him to work on a day he was not on the schedule about a month earlier, I find that the General Counsel has made out a prima facie case that Gauthier's union

activities motivated the Respondent's decision not to let him work on February 27. However, Brooks' and Silverman's testimony convinces me that Gauthier would not have been permitted to work on February 27 even in the absence of union activity. Gauthier requested and was given the day off and Labrada was scheduled to cover his absence. There is no dispute that Gauthier never bothered to tell Brooks, or any other supervisor, that his plans had changed and he now wanted to work. When he appeared for work on February 27, he was no longer needed. The Act does not require the Respondent to overstaff a shift to accommodate a union activist's shifting plans. The earlier incident when Gauthier was permitted to work is distinguishable. In that situation, Gauthier had been scheduled off as a result of the supervisor's admitted mistake. On February 27, Gauthier was scheduled off as a result of his own actions. Even assuming Gauthier told Brooks that he wasn't sure he would need the day off and would let her know "at the last minute," I would still not find a violation. The Respondent could hardly be expected to run a business if its employees take such a cavalier approach to their work schedule. What was the Respondent supposed to do if in fact Gauthier did wait until the last minute to tell Brooks he wasn't coming in? Who would cover the shift then? Based on the evidence before me, I find that the Respondent has met its *Wright Line* burden with respect to this incident. Accordingly, I shall recommend dismissal of paragraph 27 of the complaint.

Gauthier testified that, on March 26, he noticed that one of his supervisors, Valencia, was observing him while he handed out union leaflets on break. Shortly thereafter, Valencia went into the office and returned with a stack of the Respondent's campaign literature. According to Gauthier, Valencia told Gauthier that he had to hand them out to other employees, that it was part of his job. When Gauthier protested, Valencia told him that when Valencia had been a union supporter in the last election, he had also been required as a housekeeping porter to hand out procompany literature. Gauthier took the leaflets from Valencia but he did not hand them out. When Valencia returned later and asked Gauthier why he had not handed out the Respondent's leaflets, Gauthier replied that he and his crew had been on break and that he would hand them out later. Valencia walked away and left work for the day shortly thereafter. Gauthier begrudgingly handed out the leaflets later in the shift. Valencia admitted giving Gauthier campaign literature prepared by the Respondent and telling Gauthier to distribute it on second and third shift. According to Valencia, he did this because Valencia was not present on those shifts to hand out the literature himself. Valencia recalled that this incident occurred about a month before Gauthier's March 27 suspension. He acknowledged that Gauthier appeared "bothered" by his request.

The next day, according to Gauthier, the entire crew was called to a meeting in the nursing conference room with Pryor, Brooks and Valencia. Pryor spoke at this meeting, telling the employees that things had been "kind of weird" with changes in management and everything, but that things were working out and the employees should keep up the good work. At the end of the meeting, Valencia told Gauthier that Pryor wanted to meet with him in the environmental services office. Gauthier

went to the office where he met with Pryor. Valencia and Brooks were also present. Pryor berated Gauthier, telling him that his crew did a "horrible job" the night before and complaining that the dining room carpet had not been cleaned properly. Gauthier told Pryor that he knew this and that he had noted it on his report.⁴¹ Pryor then told Gauthier that he had received information that someone saw Gauthier get into his car the night before, drive around from Bennett lobby to the Kuriansky building, post union literature, then drive back and clock out. Gauthier explained to Pryor that he had gone out to the parking lot to warm up his car as usual, then clocked out as usual before going to Kuriansky, where he admitted posting literature. Gauthier explained further that after doing this, he had a cigarette with several employees and left for the night. After explaining his actions the night before, Gauthier complained to Pryor that he was angry and insulted that the Respondent would use the security camera to keep track of his movements and would accuse him of engaging in union activities on the Respondent's time. Pryor then handed Gauthier some more of the Respondent's campaign literature and told him that it was part of his job to distribute them to other employees. No disciplinary action was taken against Gauthier based on the report Pryor described about his alleged abuse of company time.

The Respondent's witnesses, Brooks, Pryor, and Valencia, were not asked specifically, on direct examination, about this meeting. Pryor did admit, on cross-examination, that he asked Gauthier to hand out some of the Respondent's campaign literature on his shift. According to Pryor, he did this because he had not had time to do it himself. He considered this no different than other instances where he asked Gauthier to communicate some information to employees on the second shift. Brooks and Pryor acknowledged that Gauthier communicated his unhappiness with being asked to distribute the Respondent's literature.

The complaint alleges, at paragraph 17(a), that the Respondent unlawfully created the impression of surveillance when Pryor described to Gauthier the "report" he had received concerning Gauthier's activities the night before. The complaint further alleges, at paragraphs 17(b) and 22, respectively, that Pryor's and Valencia's instructions to Gauthier to hand out the Respondent's campaign literature violated Section 8(a)(1) of the Act. Because Gauthier's testimony that Pryor accused him of engaging in union activity without clocking out is undisputed, I credit his testimony. Pryor's statements about the "report" he received and the details he provided to Gauthier about his alleged activities the night of March 26 would reasonably lead an employee to believe that the Respondent had them under surveillance. The Board has found such statements unlawfully create the impression of surveillance in violation of Section 8(a)(1). See *Ichikoh Mfg.*, 312 NLRB 1022 (1993); *United*

⁴¹ Gauthier had noted on his report for the prior evening's shift that the employee assigned to clean the spot did not do a good job. Gauthier had also noted that his crew had not been able to clean one area and that they did not "break down" the recreation room, which was set up for a meeting, because more meetings were to be held there. Gauthier had also made a point of noting in this report that Valencia had ordered him to hand out antiunion literature.

Charter Service, 306 NLRB 150, 151 (1992). I find that the Respondent violated the Act, as alleged at paragraph 17(a) of the complaint, through Pryor's statements to Gauthier at this meeting on March 27.

In *Clinton Food 4 Less*,⁴² the Board adopted the administrative law judge's decision that an employer who requires its employees to convey its antiunion message to other employees violates Section 8(a)(1) of the Act. The judge reasoned that such conduct coerces employees to act as agents of the employer and robs them of their right to freely exercise their Section 7 rights. The judge cited decisions in which the Board had found an employer's coercive requirement that employees wear pro-employer buttons or T-shirts unlawful. *Id.* at 612, and cases cited therein. Based on this precedent, I find that the Respondent violated Section 8(a)(1) here when Pryor and Valencia required Gauthier to hand out the Respondent's campaign literature on March 26 and 27.

Gauthier admitted that he was upset when he left the meeting with Pryor and his supervisors on March 27. He acknowledged telling Brooks, as he was leaving, that "this is ridiculous. If Jose Valencia has a problem with me, we should settle this man to man, or else, if he doesn't, I'll start taking things personally. I can get downright dirty too." Gauthier testified that Valencia was near enough to have heard these remarks. According to Gauthier, Valencia went into the office, came out and approached him. As the two men passed, they apparently brushed shoulders. Valencia asked Gauthier, "Do you have something to say to me?" Gauthier at first said, no, but then changed his mind and said, "[Y]es, let's go outside and talk for a minute." Valencia told Gauthier that, if he wanted to talk, they could talk in his office. Gauthier and Valencia went into the office. According to Gauthier, as soon as he got in the office, Valencia called Pryor on the phone, telling him that Gauthier was "being very hostile." Valencia then walked out of the office, telling Gauthier that he would speak to him after he talked to Pryor. Gauthier followed Valencia to Pryor's office. Shortly after Valencia went into Pryor's office, Gauthier was called in. Pryor again berated Gauthier, saying that Gauthier hadn't done anything since he got to work that day but cause a commotion, cause problems. Gauthier testified that he tried to speak up but Pryor wouldn't let him. Gauthier just listened and, when Pryor was done, he left the office and returned to work.

Gauthier testified that he spoke to the Union's organizer, Paul Fortier, later that day during a smoke break when Fortier met him in the Respondent's parking lot to give him more union leaflets to distribute. According to Gauthier, Fortier told him that he did not have to hand out the Respondent's literature and that it was illegal for them to ask him to do so. When Gauthier returned to work, he told Brooks what Fortier had said. Gauthier testified that he also spoke to one of the nursing supervisors later the same day.⁴³ The supervisor had commented that Gauthier looked upset and Gauthier told her why. While he and the nursing supervisor were discussing the Union, Pryor walked by and shook his head. A short time later,

Gauthier was paged to Pryor's office. When he got to the office, Pryor told Gauthier that he considered the earlier incident with Valencia to be harassment and that he was suspending Gauthier without pay pending an investigation of the incident. Pryor then had security escort Gauthier out of the building. Before leaving, Gauthier went to the front office to try to talk to someone higher up. He encountered Magid and the nursing supervisor he had spoken to earlier. When Gauthier tried to say something, Magid said he did not have time to talk to him, that he was leaving for New York. Magid also told Gauthier that Silverman was his supervisor, and that Gauthier was suspended. Gauthier turned to the nursing supervisor and said, "Now do you see what I'm talking about?"

Gauthier attempted several times to schedule a meeting with Pryor to discuss the suspension but each time the meeting was canceled. On April 4, Pryor called Gauthier and told him he made a mistake when he suspending him without pay. He told Gauthier that he would be paid during the time on suspension. A meeting was finally scheduled for April 9. Gauthier attended this meeting with Tawana Williams as a witness. Also present were Pryor and an employee from the human resources department, Linda Ciszewski. Gauthier gave his side of the story and provided Pryor with the names of four witnesses he said would support his version, i.e., Tom Gallagher, Lisa Eleazer, Marie Martin, and Rakic Smikle. Gauthier asked when he could return to work. Pryor responded that he needed time to conduct an investigation and that he would try to have a decision by Friday, April 12. The next day, April 10, which was also the day before the election, Pryor called Gauthier and informed him that Pryor had decided to terminate him because of his "past history and performance, his lack of motivation and the incident with Valencia."

Rakic Smikle, who had been terminated by the Respondent after 3 years of employment shortly before she testified, corroborated Gauthier's testimony regarding the incident with Valencia on March 27.⁴⁴ Smikle testified that she encountered Gauthier pacing in the hallway, just outside the cafeteria, as she turned the corner from the resident's dining room on her way to the cafeteria. Although she testified that she could tell something was wrong by the way he was acting, she denied that he was acting "unusual." In her pretrial affidavit, Smikle had stated that Gauthier looked "really upset." Observing this behavior, Smikle asked Gauthier if anything was wrong. She recalled that he replied, "[N]ot now, not now." At that point, she saw Valencia come out of his office, across from the cafeteria and walk toward Gauthier. She testified that Valencia said to Gauthier, "[D]o you have something to say to me?" Gauthier at first said no, then said, yes and asked Valencia to go outside to talk. Valencia declined the invitation, telling Gauthier that they could talk in his office. Smikle then went into the cafeteria and heard nothing further about the incident. Smikle testified that she went to see Pryor on her own when she heard that Gauthier had been suspended. She testified further that she told Pryor that she had been there and that nothing happened. Ac-

⁴² 288 NLRB 597 (1988).

⁴³ The Respondent identified the supervisor as Christine Tocchi, director of nursing.

⁴⁴ Although the Charging Party stated its intent to file a charge over Smikle's termination, no further information was provided regarding this issue before the close of the hearing.

cording to Smikle, Pryor told her the suspension had nothing to do with that incident, that people from all over the facility had been complaining that Gauthier was not doing his job. Smikle testified that she told Pryor that she was going to go to the Union and tell them that she would be a witness for Gauthier. Smikle gave her affidavit during the investigation before her termination by the Respondent.

Brooks did not testify regarding the conversations Gauthier described having with her on March 27. She did testify that some time earlier on a date she could not recall Gauthier had expressed to her that he was upset that Valencia was promoted to the supervisor's position instead of him. Brooks recalled that Gauthier questioned Valencia's lack of experience and ability to handle the job. Valencia had not worked in housekeeping before being given the supervisor's job in environmental services. His prior position was "wheelchair specialist." Brooks also testified that Gauthier had difficulty working with Valencia before his suspension, that he would ignore instructions Valencia gave him. She recalled that Valencia had complained to her about the way Gauthier treated him. On cross-examination, Gauthier had admitted that he was unhappy over Valencia's promotion, that he believed he was more qualified for the position and that he expressed this view to Pryor. Despite these feelings, Gauthier claimed that he had no problem working with Valencia before March 26 and 27.

Valencia, who was no longer employed by the Respondent when he testified at the hearing, having resigned in November under threat of termination, testified for the Respondent. According to Valencia, he was walking down the hall toward the cafeteria when Gauthier "shouldered him" while mumbling something. Valencia stepped aside and asked Gauthier if he had something to say. When Gauthier said no, Valencia continued into the cafeteria. Gauthier followed him in and, yelling from across the room, in front of a number of employees and others who were there, said: "Yeah, I got something to say to you, I'm sick of this s—t." According to Valencia, he suggested to Gauthier that they have this conversation in the office and Gauthier replied, "[L]et's take this outside." Valencia then directed Gauthier to go to the office. Valencia testified further that, when they got to the office Gauthier slammed the door and continued to harangue him, claiming that management was picking on him. Valencia called Pryor, telling him that Gauthier was in his office, harassing him. Pryor told Valencia to come to his office. Valencia directed Gauthier to go back to work, telling him that Pryor would speak to him later. According to Valencia, when he got to Pryor's office, he accused Gauthier of calling him outside to fight. Valencia threw his keys and badge on the desk and told Pryor that he didn't have to deal with this, that it's not right that he has to tolerate such abuse from Gauthier. Valencia denied that he was upset when he walked into Pryor's office, specifically denying that his eyes were large, or that he was red. Valencia claimed that he remained calm throughout this incident, despite the apparent threatening conduct and belligerent attitude of Gauthier.

Pryor contradicted Valencia's description of his demeanor that day. According to Pryor, when Valencia called him on the phone, he was upset, saying that he needed to speak to Pryor right away and, when he entered the office, Valencia was

sweating with his eyes bulging. Pryor testified that Valencia described the incident much the same way Valencia did on the witness stand. Shortly after Valencia got to his office, Gauthier arrived. Pryor testified that he told Gauthier it was not appropriate to ask Valencia to "go outside," that this could be viewed as a threat. Pryor recalled that Gauthier did not deny saying this but he did deny intending it as a threat. Pryor also recalled that Gauthier did not deny "shouldering" Valencia. Pryor also described Gauthier as agitated, pacing, unable to sit down, rolling his eyes, and making facial expressions. However, despite the presence of these two apparently agitated and hostile individuals in his office and despite his testimony that he did not "feel safe," Pryor did not feel the need to call security. Pryor also testified that, after Gauthier left his office, Valencia told him that he could not work there anymore, giving Pryor his keys and threatening to quit. Pryor testified that although he had the authority to suspend Gauthier on the spot he did not do this. Instead, he discussed the situation with Vice President Silverman, his boss, admittedly because of Gauthier's active role in the union campaign and the pending election. After consulting with Silverman, Pryor suspended Gauthier without pay, which he conceded was contrary to policy. When he learned he had made a mistake, he called Gauthier and told him that he would be paid during the investigation.

According to Pryor, he prepared a written report immediately after the incident, summarizing events leading up to the suspension. In his written report, Pryor describes the meetings with Gauthier on March 26 and 27, which preceded the incident with Valencia, in which Pryor criticized Gauthier's work performance. The report refers to Gauthier "doing personal work on company time." Pryor reluctantly admitted that was a reference to Gauthier's union activity. In the report, when he described the meeting with Valencia and Gauthier in his office after the incident, Pryor wrote that he told Gauthier "that the whole issue boiled down to one thing, that he (Farid) was not doing his job."

Pryor testified that he did conduct an investigation after Gauthier was suspended. According to Pryor, he spoke to three witnesses, including Smikle. Pryor denied that Smikle approached him on her own to give a statement. Pryor recalled that one of the witnesses claimed to have seen nothing, Smikle claimed that she didn't see anything bad and the third, the nurse supervisor identified by Gauthier, said she did not see Gauthier until after the incident. Pryor did not recall canceling meetings with Gauthier before the meeting on April 9. Pryor claimed that he could not recall everything that was said during that meeting but he did recall that Gauthier reminded him of a conversation they had the day before where Gauthier told Pryor that he and Valencia would never be able to get along. Pryor also recalled that Gauthier downplayed the incident, denying that his invitation to Valencia to "go outside" was a threat.

Pryor testified that after conducting the investigation he met with Magid and Silverman and made the decision to terminate Gauthier. Pryor testified further that he fired Gauthier for two reasons, the incident with Valencia, and the continuing failure of Gauthier to perform his job. While acknowledging that he made the decision the day before the election, Pryor denied that the decision was rushed. However, the "Employee Change of

Status” form completed by the Respondent’s human resources office to effectuate the termination on April 10 has the word “RUSH” stamped on top.

The Respondent offered into evidence several warning notices Gauthier had received during his employment as proof of his poor performance as a “supervisor” or shift leader. The first of these is the March 2001 warning previously referred to that Gauthier received when he allowed employees to work overtime to complete an assignment without authorization. The documentation of a “follow-up meeting” held on June 20, 2001, signed by former Supervisor Jeff Long indicates that Gauthier’s performance had improved and that no additional followup or action was needed. Also in evidence is a June 18, 2001 “second warning,” signed by former Supervisor Long and former Director Castrillon, for “failure to complete tasks in a timely manner and failure to communicate with supervision of tasks.” This warning relates to incidents that occurred between May 31 and June 12, 2001. Although the warning notice provides for a followup meeting to be held on September 18, 2001, there is no evidence in the record that any such meeting occurred. The next warning, issued in December 2001 by Castrillon, is the one that Gauthier testified was issued after his supervisors began finding fault with everything he did after he became an open union supporter. As described above, Gauthier contested each incident cited in this warning and sought to meet with Silverman about it. Although this warning also called for a follow-up meeting in thirty days, none was held and Castrillon left soon thereafter to be replaced by Pryor. Although Pryor claimed in his testimony to have had problems with Gauthier performing his assigned duties almost from the beginning, he had not documented any of this before the incident on March 27. He acknowledged in his testimony that Gauthier often responded that he had been unable to complete certain assignments because of a lack of staff.

The General Counsel alleges, in the complaint, that Gauthier’s March 27 suspension and April 10 termination were discriminatorily motivated in violation of Section 8(a)(3). The Respondent contends that, even if the General Counsel could satisfy his *prima facie* burden, the evidence establishes that the Respondent would have taken then same action even in the absence of union activity. As previously noted, the record clearly establishes knowledge of, and animus toward Gauthier’s activities in support of the Union. This by itself is not enough to make out a *prima facie* case of unlawful motivation. Because there is no direct evidence of an unlawful motivation, the General Counsel must rely on circumstantial evidence to satisfy this element of its case. The timing of Gauthier’s suspension, soon after the Respondent unlawfully created the impression that his activities were under surveillance and unlawfully coerced him to distribute its campaign propaganda, and after he had expressed his objection to being used by the Respondent in this fashion, might suggest a discriminatory motive. However, the suspension also came on the heels of Gauthier’s involvement in an apparently threatening confrontation with his supervisor. Thus, timing does not support the General Counsel’s case with respect to the suspension, unless one were to believe that the incident between Valencia and Gauthier was orchestrated by the Respondent in order to create a reason to suspend

him. I do not subscribe to this conspiracy theory. The Respondent could not have predicted that Gauthier would have been as angry as he was after the meeting on March 27.⁴⁵ Although I found Pryor’s testimony exaggerated regarding Gauthier’s appearance when he was in the office with Valencia, I also find that Pryor’s exercise of caution by suspending Gauthier pending an investigation was a reasonable exercise of management discretion in the face of an incident like this. The fact that he discussed it with Silverman before implementing his decision because of Gauthier’s status as a union supporter does not prove a discriminatory motive. It only evidences an extra degree of caution in light of the pending union election. Accordingly, I find that the General Counsel has not met his burden of proving that the Respondent was motivated by Gauthier’s union activities when it suspended him, pending an investigation, on March 27.

Whether the Respondent’s subsequent decision to terminate Gauthier, after the “investigation,” is a different matter. The General Counsel contends that the “cursory investigation” conducted by the Respondent during the suspension and the “rush” decision to fire him the day before the election, and only one day after the Respondent interviewed Gauthier as part of the investigation, suggests that the Respondent was motivated by a desire to rid itself of a key union organizer before the election. The General Counsel notes that not all the witnesses identified by Gauthier at the April 9 meeting were interviewed. The timing of the Respondent’s decision to terminate Gauthier, the day after meeting with him for the first time during the investigation, and after Pryor told Gauthier that he still needed to complete the investigation and would get back to him on April 12, is suspect. Gauthier had been out of work for almost 2 weeks before Pryor even met with him. The Respondent has not adequately explained why Pryor rushed to complete the investigation one day later. In considering the Respondent’s motive for converting the suspension to a termination, I also note that the witnesses that Pryor did interview did not provide any evidence that was more damaging to Gauthier’s case. One witness claimed he did not hear what Gauthier said, another said Gauthier was not doing anything wrong and the third wasn’t even in the area. Moreover, instead of focusing on the incident which led to the suspension, Pryor decided he needed to bootstrap his decision by advancing additional reasons for the termination, i.e., Gauthier’s alleged inadequacies as a shift leader. In doing so, he relied on discipline that was remote in time to the incident in question. This suggests that the Respondent, and in particular, Pryor, did not believe the incident with Valencia by itself warranted termination. Considering these factors, I am forced to conclude that the General Counsel has met his burden of proving that the Respondent was motivated by Gauthier’s union activities, at least in part, when it converted his suspension to a termination.

⁴⁵ Although there may be some dispute as to exactly who brushed whom in the hallway, there is no dispute that Gauthier was agitated and hostile toward Valencia that afternoon. He admitted as much, he expressed these feelings to Brooks, suggesting that he and Valencia settle things “man to man,” and his witness, Smikle, recalled seeing him pacing the hallway, apparently upset.

Although the Respondent may have been justified, in the heat of the moment, in suspending Gauthier, the evidence it proffered is insufficient to establish that termination would have occurred following the investigation of the incident. Gauthier's record showed no other incidents of similar hostile or threatening conduct. His "altercation" with Valencia, while ill-advised, was not threatening. Valencia himself testified that he remained calm throughout and was not threatened by Gauthier. Moreover, Valencia was not blameless in the dispute, but appeared to provoke Gauthier with his taunt, "you got something to say to me?" I also credit Gauthier that the two men bumped shoulders, rather than Valencia's claim that only Gauthier shouldered him. It is apparent that it wasn't only Gauthier who had issues with Valencia. Valencia was also unhappy with "rumors" Gauthier was allegedly spreading about him. It is clear that the passage of time since the suspension would have allowed the emotions of both men to cool so that a return to work would not have posed any risk to Valencia or other employees.

The Respondent's actions supports this conclusion. If the Respondent felt the incident alone warranted discharge, it would not have needed to add on other reasons to bolster its case, particularly where the additional reasons are a weak basis for action. Assuming I found Pryor's testimony that he repeatedly talked to Gauthier about his performance issues credible, which I do not, there is no evidence that such issues had ever led to termination of another employee under similar circumstances. Moreover, I credit Gauthier's testimony that any failure to complete a task was due to a lack of staff rather than any shortcomings on his part as a shift leader. In this regard, because Gauthier was not a true supervisor and had no real authority to order his staff to do what it would take to complete the assignments, by working overtime for example, he was not in a position to accomplish what the Respondent was asking him to do. Even with regards to the incident on March 26 when another employee failed to properly clean the dining room carpet, Gauthier himself reported this to Pryor. There was not much more he could do because he had no authority to take action against the employee whose improper cleaning fell short of what was required and he could not direct another employee to work overtime to correct the error. I thus conclude that the Respondent has not met its burden under *Wright Line* of establishing that it would have terminated Gauthier on April 10 in the absence of union activity, and in particular, the union election scheduled for the next day.

4. Carmen Dyer

The Respondent hired Carmen Dyer as a 24-hour CNA float on March 26, 2001. In July 2001, Dyer requested and was granted a full-time, 40-hour position. As a float, her shifts and work assignments varied, depending on the needs of the Respondent. According to Dyer, when she reported to work, she would go to the nursing office in the Bennett building and receive her assignment for the shift from either the scheduler or, after the scheduler was terminated, Linda DiGangi, the Respondent's assistant director of nurses. Once she received her assignment, Dyer would report to the unit where she would punch in. Depending on which unit she was assigned, it could

take her from 5 to 12 minutes to walk to the unit. Because she worked on different shifts and units, Dyer had no one supervisor to whom she reported. Her annual performance evaluation, received on March 27, was generally favorable with respect to her nursing skills and treatment of the residents but did note that she had a problem with attendance and tardiness. Dyer, in setting her goals for the future as part of this evaluation, acknowledged her need to "be on time." The supervisor who evaluated Dyer, Debbie Straubel, did not recommend a raise at that time. Instead, she recommended reevaluating Dyer in 3 months, "pending improvement of attendance and punctuality." The Respondent fired Dyer before she could be reevaluated.

Dyer had previously been an active member of a different local of the Union while working as a CNA in New York City. She became involved in the Union's efforts to organize the Respondent's employees early in the campaign, by signing a card on September 28, 2001. Dyer signed the card, using her maiden name, Carmen Morgan. She testified that she did this out of fear of being fired if the Respondent knew she signed a card. Other than signing a card, Dyer did not engage in any other activity in support of the Union until February and March, when she attended a couple union meetings, one held at the commuter lot down the road from the Respondent's facility and another at a union office in Bridgeport, Connecticut.

As noted above, Dyer spoke up at one of the meetings conducted by the Respondent's chairman, Glickman, on April 4, asking out loud if Glickman thought the employees were stupid because he wouldn't let them ask questions at the meeting. After a brief exchange with Glickman, Dyer walked out of the meeting.⁴⁶ Dyer testified that the next day, while working on Bennett 2, Nursing Supervisor Laidlaw asked to speak to her. Dyer then accompanied Laidlaw into the breakroom where, according to Dyer, Laidlaw interrogated her by asking if she had ever been a member of a union and what she knew about 1199. Dyer told Laidlaw that she had been an active member of 1199 in New York but she didn't know much about the Union in Connecticut. Laidlaw then asked if Dyer had attended any of the meetings they were having. When Dyer told Laidlaw she had not, Laidlaw asked why. Dyer said she did not attend the meetings because they didn't have anything to do with the residents, so she didn't see the point of going to the meetings. Laidlaw told Dyer that the Respondent's president, Magid, was asking her to attend the meetings that the Respondent had arranged for the employees with the outside labor consultants. Laidlaw also told Dyer that Magid did not want her to vote for the Union. Laidlaw ended this conversation by telling Dyer to think about her family and her job and to think about the residents at the Jewish Home. When Dyer replied that she was thinking about them, but that she also had to think about herself, Laidlaw said, "I'm begging you again to think about the residents and what side you're going to go." Dyer told Laidlaw that she was not going to tell Laidlaw how she was going to vote and Laidlaw walked away.

Laidlaw testified for the Respondent about this conversation. She corroborated Dyer's testimony that it was Laidlaw who

⁴⁶ Glickman did not specifically deny Dyer's testimony regarding the meeting she attended.

initiated the conversation by approaching Dyer while she was in the solarium and that she and Dyer then went into the break room to have their discussion. According to Laidlaw, she approached Dyer with one of the flyers that had been handed out to ask her if she had any questions about it. Laidlaw testified that this was her practice during the campaign. Even though Dyer told Laidlaw that she didn't have any questions, Laidlaw continued the conversation, asking Dyer if she understood the process. According to Laidlaw, the flyer she was addressing dealt with contract negotiations and benefits and she explained to Dyer how benefits were negotiable. Laidlaw recalled that Dyer told her she was very happy at the home, hoped to work there until retirement, and that she did not think the Union was necessary. Laidlaw denied asking Dyer how she was going to vote and denied telling Dyer to think about her family and her job when voting. According to Laidlaw, she knew better than to say such a thing because of the training the Respondent had provided. Laidlaw did recall telling Dyer that she should make up her own mind when voting and should not vote a certain way because someone told her to. Laidlaw also recalled Dyer telling her that she did not like going to the Respondent's meetings because there were too many of them and they were unpleasant. According to Laidlaw, this was the only conversation she had with Dyer during the campaign.

The complaint alleges, at paragraphs 8(e) and (h), that Laidlaw unlawfully interrogated Dyer and threatened her with loss of her job and benefits during this conversation. Resolution of this allegation turns exclusively on credibility. Because there is no dispute that Laidlaw approached Dyer and initiated a private conversation with her in order to convey the Respondent's message as part of the campaign, the only question is whether Dyer's or Laidlaw's version of the conversation is true. I have previously noted my concerns about Laidlaw's credibility. Dyer, who appeared to have difficulty recalling the events, requiring the assistance of leading questions from the General Counsel, was not any more impressive as a witness. On balance, I have decided to credit Dyer's version of this conversation because her description of it is consistent with Laidlaw's strong support for the Respondent's position and her admitted desire to convince the employees of the need to defeat the Union. It is highly likely that she would have sought out Dyer, whose union support had been kept hidden, to attempt to gauge whether she was a union or company voter, and to urge her to seriously consider her vote and the consequences of a vote for the Union. Laidlaw acknowledged telling Dyer how her benefits would become "negotiable" if the Union won the election. I do not find it hard to believe that she would have gone further and pleaded with Dyer to vote no, casting the choice as one affecting the future of her job, her family, and the fate of the residents. Having credited Dyer, I find that her questioning of Dyer as to her previous experience with and knowledge of the Union amounted to unlawful interrogation under the test applied by the Board to such allegations. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). See also *Westwood Health Care Center*, 330 NLRB 935, 939-940 (2000). I further find that Laidlaw's statement that Dyer should think about her family, her job, and the residents was an implied threat of job loss if she voted in favor of union representation. *St. Luke's Hospi-*

tal, 258 NLRB 321, 322 (1981). Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in the complaint, through Laidlaw's conversation with Dyer.

Dyer testified further that, the next day, April 6, Magid approached her while she was in a patient's room. Dyer was working over on second shift at the time to help out due to short staffing. Another CNA who was in the room assisting the other resident remained in the room while Dyer went out in the hallway to speak to Magid. Dyer testified that, after reminding her that the election was set for the following Thursday, Magid told her to "think about your family, your job and the residents." When Dyer asked Magid, "[W]hat about my job?," Magid replied, "[Y]ou know, if the Union wins, you can get fired." Dyer then asked why would she get fired and Magid responded that the home couldn't afford to have the union. Magid urged Dyer to really think about what side she was going to be on. Dyer responded in the same manner she responded to Laidlaw, that her decision in the election was a personal decision and she was not going to disclose how she would vote. At the end of the conversation, Magid again told her to try to think about her job.

Magid testified for the Respondent that he could not recall having any conversation with Dyer, either in a resident's room or outside. Although Magid recognized Dyer's name, he could not recall what she looked like. Magid acknowledged that he did have conversations with employees as he walked through the home before the election, trying to convey the Respondent's message to as many employees as he could and generally making himself available to answer any questions they had. When pressed on cross-examination, Magid conceded that he was not denying that he spoke to Dyer, he just could not recall who she was. On direct examination by the Respondent's counsel, Magid denied, in response to leading questions, making the statements attributed to him by Dyer.

The complaint alleges, at paragraph 12(d), that Magid unlawfully interrogated Dyer during this conversation and, at paragraph 12(e), that his statements threatened Dyer with job loss if she voted for the Union. As there were no other witnesses to this conversation, resolution of this issue turns exclusively on credibility. Although Magid denied making the specific statements attributed to him by Dyer, his denial was not based on any specific recollection of such a conversation. In fact, because Magid could not recall what Dyer looked like, he acknowledged the inability to recall whether he even had a conversation with Dyer. At the same time, Magid admitted that he had one on one and group conversations with many employees before the election as part of his effort to convince them that a union was not needed. I credit Dyer's testimony that she had a conversation with Magid because she was able to recall it with sufficient detail to render her testimony believable in light of Magid's admitted practice of seeking out employees to talk to them about the election. While I believe Dyer's testimony that she had a union-related conversation with Magid shortly before her termination, I find it hard to believe that he made the statements she claimed. Her testimony regarding this conversation is almost identical to what she recalled that Laidlaw said to her, i.e., to think about her job, her family, and the residents when she cast her vote. Although Magid and Laidlaw may

have had the same theme, it is highly improbable that they would have used the same words to convey that theme. I find it more likely that Dyer was confusing these two conversations, which took place a day apart. I also find it implausible that Magid, the Respondent's president, would have directly threatened Dyer that she could be fired if the Union won. I find it more likely that if the subject of job loss came up it would have been in the context of the economic consequences of union demands at bargaining, which was the theme of Magid's and Glickman's speeches to the employees. Although such predictions may be unlawful, depending on the language and phrasing employed, it is impossible to determine whether Magid's statements to Dyer crossed the line between the permissible and impermissible because she was unable to recall with any detail what Magid actually said to her. Rather, it appears that Dyer was simply giving her interpretation of what Magid said, which is insufficient to support an unfair labor practice finding. Accordingly, I shall recommend dismissal of the allegations that Respondent interrogated and threatened Dyer through statements made by Magid.

The circumstances leading up to Dyer's termination began on the afternoon of April 9 when Dyer reported to work for the 3–11 p.m. shift not feeling very well. Dyer had been off work the day before and had been ill. Because Dyer does not drive, her son and his girlfriend drove her to work, as they usually did. Dyer testified that she arrived at about 2:45 p.m., went to the nursing office and punched in and asked to speak to DiGangi. DiGangi was speaking to someone else so she told Dyer to wait. After about 10 minutes, when DiGangi was free, Dyer told DiGangi that she was not feeling well and asked, if the Respondent was not short-staffed that night, could she go home? DiGangi told Dyer she could. According to Dyer, at that point she clocked out and then went to the receptionist in the lobby and asked her to call her son for her. Although Dyer could not recall the specific time she clocked out, she was certain that she did so before going to the receptionist. After the receptionist placed the call to her son, Dyer told him to come pick her up. Dyer testified that, after speaking to her son, she walked down the hill to the main entrance to wait for her son and his girlfriend to return.⁴⁷ April 9 was the first day of the competing demonstrations by prounion and pro-Respondent employees at the bottom of the hill. Although Dyer saw this going on, she did not participate. Instead, she sat on the grass under a tree, a little way up the driveway. After about 15–20 minutes, Dyer's son and his girlfriend returned. Dyer got in the car and his son's girlfriend, who was driving, continued up the hill, into the main parking lot to turn around before exiting the facility. Dyer denied that the car stopped, or that she got out of the car, in the parking lot.

Dyer's son and his fiancé both testified, as witnesses for the General Counsel and, essentially, corroborated Dyer's testimony. Their recollections, however, were not identical. For example, although Dyer's son recalled that the car turned around in the parking lot on the right, his fiancé recalled turning at the top of the hill without entering either parking lot.

They also had different recollections as to which side of the driveway Dyer was standing when they arrived and which side of the car she entered. They agreed, however, that Dyer did not get out of the car when they got to the top of the driveway and did not reenter the facility.

Dyer testified further that she was scheduled to work a double shift the next day, April 10, starting at 7 a.m. Because she was still not feeling well, Dyer called the home, sometime between 4 and 5:30 a.m., and spoke to the supervisor on duty, a man she knew only by his first name, Al. According to Dyer, she told Al that she was still not feeling well and that she would not be coming to work. Al told her that he would write it down, but to make sure she called Linda DiGangi. Dyer testified that she planned to call DiGangi around noon, in time to call out for the evening shift, but before she could do so, the mailman delivered an envelope from the Respondent containing a pink slip and final paycheck. According to Dyer, the pink slip stated that she was terminated for violating company policy and lying to her supervisor.⁴⁸ Dyer tried calling DiGangi to find out why she had been terminated but was told that DiGangi was in a meeting. When she called later, Dyer was told that DiGangi was still unavailable so she spoke to Jacqueline Solomon from human resources, the person who initially hired her. Dyer told Solomon about the pink slip and paycheck she had received and she asked Solomon what policy she had violated. Solomon told Dyer that DiGangi said that three people told DiGangi that Dyer, after claiming to be sick, had left the building and returned later to punch out and that Dyer had lied to her supervisor. Dyer testified that she told Solomon that she didn't know what the company policy was, but that she did not do what she had been accused of. She asked Solomon who were the three people who said she did. Solomon only identified two of the three, i.e., Laidlaw and an employee named Joe who worked as a CNA on K-3. According to Dyer, Solomon did not identify the third person. When Dyer asked who was the third person, Solomon told her to call DiGangi later.⁴⁹ Dyer testified that she called DiGangi later the same day and asked her what happened. DiGangi told her essentially the same thing that Solomon had, i.e. that three people, only two of whom she identified, had reported that Dyer had not clocked out when she left sick. When Dyer attempted to dispute the accusation, DiGangi said three people can't lie.

Although Dyer recalled that DiGangi told her she would send her a letter explaining why she had been terminated, she testified that she never received such a letter. Dyer specifically denied seeing the letter dated April 10, which is in evidence and which reads as follows:

This is to confirm your termination of employment effective immediately as discussed this afternoon. As we mentioned, we have reviewed your entire personnel record and the events of yesterday and this morning. Based upon these facts, you have been terminated for the following reasons:

- Stealing company time by failing to punch out;
- Lying to your supervisor;

⁴⁷ Dyer was able to reach her son on his cell phone while he was still enroute home.

⁴⁸ The pink slip is not in evidence.

⁴⁹ Solomon did not testify in this proceeding.

- Misrepresenting the reasons for leaving your duties;
- Failure to notify your supervisor of your absence this morning;
- Poor overall work record including a final warning for unsafe patient handling, prior discipline for excessive absenteeism and the unsatisfactory performance review dated March 27, 2002.

Dyer acknowledged on cross-examination that she had a discussion with DiGangi in early April about medical problems she was having that affected her attendance. She also acknowledged that the performance evaluation she received shortly before her termination was not as good as her first evaluation because of attendance and tardiness problems she was having. However, Dyer claimed that the “tardiness” was caused by delays in getting her assignment in the nursing office, which made her late getting to the unit. Dyer explained that she was not supposed to punch in until she got to the unit.⁵⁰ Dyer denied that she ever received a written warning, but acknowledged “reading” one that had something to do with her use of some equipment.⁵¹ Dyer also denied getting a written warning specifically for attendance. Dyer adhered to this denial even after being shown an October 18, 2001 warning notice, bearing her signature, for excessive tardiness. Dyer’s failure to recognize warning notices she signed was similar to her inability to recall other documents bearing her signature in which she acknowledged receipt of the Respondent’s handbook and other orientation documents.

DiGangi, who was the Respondent’s acting director of nursing services when she testified and had been the assistant director during the campaign, testified that she made the decision to fire Dyer. DiGangi characterized Dyer as a “marginal employee,” testifying that she had a “conversation” with Dyer about her attendance and entire record sometime before the incident in question. DiGangi claimed that, either during this conversation, or at another time, within 3 weeks of the vote, Dyer volunteered that she was not in favor of the Union. When questioned on cross-examination by the Respondent’s counsel, Dyer had denied having such a conversation with DiGangi.

With respect to the events leading to Dyer’s termination, DiGangi recalled Dyer requesting to go home, at the start of the shift on April 9, because she was sick. Although DiGangi claimed she doubted that Dyer was really sick, she granted the request after advising Dyer that this could lead to termination because she was on final warning. DiGangi claimed that Dyer was very dramatic, insisting that she was very ill and needed to leave to see her doctor. About an hour later, according to DiGangi, she was in the front office when someone complained about Dyer being at the bottom of the hill, grabbing papers out

of peoples’ cars. On cross-examination, DiGangi identified Silverman as the source of this report based on a complaint Silverman received from a male employee.⁵² DiGangi testified further that when she returned to her office Laidlaw told her that Dyer had just punched out.⁵³ According to DiGangi, this was about 1 hour after Dyer had asked to go home sick.

DiGangi testified that she was going to fire Dyer when she reported for work the next day but Dyer did not come to work. DiGangi called and left Dyer a message to call her. DiGangi testified on direct that she finally was able to speak to Dyer that afternoon or the next morning and that, when she told Dyer that she was terminated, Dyer became very angry and threatened to get a lawyer. On cross-examination, DiGangi acknowledged that the telephone conversation with Dyer occurred on the morning of April 10, with Solomon in the room. After her conversation with Dyer, DiGangi prepared the April 10 letter described above. DiGangi explained that Dyer’s alleged failure to notify her supervisor that she would be absent on April 10, cited in the letter, was based on the supervisor, Al, telling her that Dyer had not called out. DiGangi acknowledged that, in her conversation with Dyer, Dyer insisted that she had called and informed Al that she was too ill to work.

On cross-examination, DiGangi admitted that she made the decision to fire Dyer without giving Dyer the opportunity to answer the charges against her. DiGangi acknowledged that Dyer denied during their telephone conversation that she had punched out an hour after being allowed to leave work. According to DiGangi, she did not accept this denial because she had already verified with the punch detail list from the Respondent’s timekeeping system that Dyer had in fact punched out an hour later. Although DiGangi testified that she relied on the punch report to establish that Dyer “stole time” from the Respondent, that this was the primary reason she decided to fire Dyer, and that Dyer would probably not have been fired on April 10 if she had not stolen time, the Respondent did not offer the punch report in evidence when DiGangi testified on direct. Nor had the Respondent turned it over to the General Counsel in response to the subpoena request for, inter alia, all documents relied upon in terminating Dyer. Only at the very end of DiGangi’s testimony, on re-direct examination, did the Respondent produce this crucial piece of evidence.⁵⁴

In order to establish that the Respondent violated Section 8(a)(3) when it terminated Dyer, the General Counsel must show that Dyer was engaged in union activity, that the Respondent was aware of this, and that animus against such activity was a motivating factor in the termination decision. If such a showing is made, a violation will be found unless the Respondent proves that the termination would have occurred even absent Dyer’s union activity. *Wright Line*, supra. Dyer’s pro-

⁵⁰ This testimony appears to be inconsistent with Dyer’s testimony that she punched in on April 9 before speaking to DiGangi in the nursing office.

⁵¹ Dyer identified a warning dated November 16, 2001, as the warning she “read.” This warning, designated a “final warning” was signed by Dyer and related to an incident in which Dyer allegedly used a Hoyer lift improperly, potentially causing injury to a resident. The warning notice indicates that Dyer was sent home pending an investigation.

⁵² Silverman, who testified for the Respondent, was not asked to corroborate this testimony.

⁵³ Laidlaw did not testify regarding these events.

⁵⁴ Counsel for the General Counsel confirmed the representations of Respondent’s counsel that he did show the punch report to the General Counsel earlier in the hearing. However, there is no dispute that the document was not furnished in response to the subpoena and was not offered as an exhibit until rather late in DiGangi’s testimony. The reason for this is not entirely clear to me.

tected activity was limited to signing a card and attending a couple offsite union meetings. There is no evidence that the Respondent was aware of this before Dyer's termination. Although Dyer's testimony, that she spoke up during Glickman's meeting with employees about a week before her termination, is uncontradicted, her challenge to his directive that employees not ask questions did not necessarily reveal her support for the Union. I may, however, infer that the Respondent would believe that Dyer was a union supporter based on her conduct at this meeting. Such an inference is supported by the fact that both the nursing supervisor and the Respondent's president sought out Dyer for one-on-one conversations within a day or two of this meeting. Although I found that Laidlaw engaged in unlawful conduct during her conversation with Dyer, it is undisputed that Dyer declined to reveal her support for the Union even when Laidlaw invited her to do so. Dyer was consistent in testifying that at no point, in these conversations or others, did she ever reveal her union sympathies to the Respondent. In fact, Dyer signed her union authorization card under a different name to ensure that the Respondent would not find out that she was a union supporter. Under these circumstances, I cannot find that the General Counsel has met his burden of proving knowledge, an essential element of his case.

The General Counsel would argue that knowledge is established by circumstantial evidence, such as timing, departure from past practice and lack of investigation of misconduct. I disagree. The timing of Dyer's termination has more to do with the alleged misconduct than with the upcoming election. DiGangi made the decision to terminate Dyer after confirming Laidlaw's report that Dyer had punched out an hour after she was granted permission to leave work. Under these circumstances, it cannot be said with any degree of certainty that DiGangi was motivated by the upcoming election rather than the immediate issue regarding an alleged abuse of time in making the decision to terminate Dyer. Although DiGangi admitted making her decision before giving Dyer an opportunity to respond to the accusation, and conceded that she would normally have provided such an opportunity, DiGangi also testified, believably, that the confirmation provided by the punch report was enough to convince her that Dyer had indeed "stolen time." Although I cannot condone the Respondent's having withheld this critical piece of evidence from the General Counsel until late in the proceedings, I cannot reject the evidence, which clearly shows that Dyer punched out almost an hour later than she claimed she did. From the undisputed testimony of the Respondent's timekeeper, it is clear that the time on the punch report could not have been altered after the fact without the computer indicating the fact that the time was changed. It is also clear from the evidence, including Dyer's employment record, that DiGangi had reason to believe that Dyer was not being truthful when she asked to leave work. Dyer had already received discipline for her attendance and tardiness and, in her recent evaluation, had any recommendation regarding a raise deferred pending improvement of attendance and punctuality. Considering Dyer's very limited union activity and the Respondent's lack of knowledge of that activity, I cannot find that the General Counsel has met his burden of proving that protected activity was a motivating factor in the Respondent's

termination of Dyer. Accordingly, I shall recommend dismissal of this allegation of the complaint.

5. Ebonie Stewart

Stewart was employed by the Respondent as a dietary aide from October 1996 until her termination on July 1, almost 3 months after the election. For the last couple years, she had worked the first shift, from 6:30 a.m. to 3 p.m. Timothy Horan was the director of food services and her supervisors were Donna Erickson or Julie Wargo. Although hired as a part-time 16-hour employee, Stewart generally worked a full-time schedule. Erickson completed her last evaluation, on October 1, 2001, rating Stewart as a satisfactory employee. Stewart received a 3-percent merit increase as a result of this evaluation. Erickson noted on the evaluation that Stewart's attitude, accuracy and attendance had improved.⁵⁵

Stewart became involved in the union effort early in the campaign. She signed a card given to her by Tawana Williams on September 27, 2001, and attended meetings away from the facility on a regular basis beginning in November. Stewart became one of the key union organizers in the Home and was very visible in her support of the Union. She handed out union literature on her breaks in the kitchen as well as at the bottom of the hill when off-duty. As previously described, she was with Gauthier and Williams when Magid, Silverman, and Pryor evicted them from the cafeteria on February 15, after they were found to be distributing union literature to employees while off-duty. Stewart was in the group of employees who accompanied union organizer Paul Fortier on March 1 when the Union demanded recognition. Stewart was also one of a group of employees pictured in a leaflet widely distributed by the Union before the election headlined, "What Does Our Future Hold?" and she served as the union observer at the April 11 election. Stewart also testified, without contradiction, that she spoke up at one of the meetings that the Respondent arranged with the consultants from direct labor training, questioning his affiliation. Her questions prompted the consultant to ask, "What are you, their spokesperson?" After this incident, Stewart was no longer invited to these meetings.

Stewart testified that on January 16 she and fellow dietary employee Melissa Quarles went to see Vice President Silverman about concerns they had. According to Stewart, they were taking up Silverman on his invitation to see him if they had any problems or complaints. One of Stewart's concerns involved discipline she received for allegedly violating the Respondent's funeral leave policy by taking time off to attend the funeral of her uncle. After discussing the Respondent's policy, Silverman volunteered that he had spoken to the Respondent's attorneys who told him, after looking at her file, that the Respondent had enough to get rid of her a long time ago. Silverman did not rebut this testimony.

On June 28, Stewart was assigned to make toast for the morning breakfast trays. Erickson was the supervisor on duty

⁵⁵ Stewart had received a couple written warnings and a suspension before this evaluation for attendance and attitude problems. In addition, her 2001 evaluation had been held up for 2 months because of these issues. The October 2001 evaluation, noting improvement, supercedes this earlier disciplinary record.

at the time but she was in the dining room. According to Stewart, Director Horan walked by and then, without speaking directly to her, began complaining loudly in front of other employees that the toast was too light. Stewart observed Horan go into the dining room and heard him complaining, loudly, to Erickson about the toast. Erickson and Horan then walked back into the kitchen and, while standing behind her, Horan continued complaining. Stewart recalled that Horan was saying things like, "How long has she worked her, doesn't she know how to make toast, she should know better, etc." Horan then instructed Erickson to talk to Stewart about the toast. According to Stewart, Erickson then approached her and said the toast needed to be darker. In response, Stewart told Horan, who was still standing behind her, that he didn't need to go all the way to the dining room to get Erickson, he could have just told her to make the bread darker. At that point, according to Stewart, Horan blew up, saying, "[W]ho the hell do you think you are? I don't have to talk to you, I'm the director. If I tell a supervisor to tell you something, you have no right to come and question what I say and do." Horan continued and became more abusive, finally telling Stewart to get out of the building. When Stewart asked Horan if he was serious, Horan repeated, "[G]et out of here!" Stewart responded that she would leave because she "wasn't going to walk around on eggshells for you or anybody in here." As Stewart was leaving, Horan followed her, continuing to berate her, until she left the building. Stewart testified that she only raised her voice after Horan began yelling at her. She denied cursing or using profanity toward him.

Stewart testified further that when she reported to work on June 30, her next scheduled workday, Supervisor Wargo told her to go home, that she was terminated, or at least suspended. Wargo advised Stewart to call human resources the following Monday. On Monday, July 1, Stewart spoke to Solomon, the Respondent's human resources director on the telephone. Solomon told Stewart that she had been terminated and that she could come to the Home to pick up her paycheck. Stewart went to the Respondent's facility and met with Solomon the same day. According to Stewart, Solomon would not let her give her version of events, instead telling Stewart that she was fired for "verbal abuse" and that there was nothing she could do about it. Solomon told Stewart that the Respondent had already talked to their lawyers and been told that it was okay to fire her because it was after the election. When Stewart asked Solomon if she could have something in writing, explaining why she was fired, Solomon told her she didn't have anything yet, to come back in a few days.⁵⁶ When Stewart returned to the facility a couple weeks later and asked for a copy of her personnel file, she found a written memo, dated June 28, addressed from Horan to her regarding her termination. Stewart testified that this is the first and only written notice she saw of her termination.

Horan's memo describes the toast incident of June 28 differently than Stewart recalled it. According to the memo, it was Stewart who became verbally abusive toward him first. Horan wrote that Stewart's hostile behavior continued after he in-

structed her to leave. He recites that she said that she was sick of people talking behind her back and that she "wasn't walking on egg shells in this place." In explaining the reason for terminating Stewart, Horan wrote that she had

a long history of problem behavior and other issues regarding her work habits such as attendance, tardiness, and a very negative attitude. She has been on final notice and has been spoken to on numerous occasions concerning her attitude and poor work habits.

Because of her past record of poor performance and her continued aggressive and negative behavior and this final act of insubordination, I am left no other choice than to terminate her employment effective immediately. Ebony has been treated fairly and has been adequately counseled and warned in writing concerning her continued unacceptable attitude and behavior.

Erickson and Horan were the only witnesses called by the Respondent regarding this allegation. Erickson testified that Stewart became "very, very, very angry and hostile" after she told Stewart that the toast was too light. According to Erickson, Stewart "went off" on Director Horan, asking, "[W]hy couldn't he come over and tell me himself?" She recalled that even after Horan told Stewart to leave she continued to be abusive and hostile toward him. Erickson conceded, on cross-examination, that Stewart was not hostile toward her. Erickson identified a memo dated June 28 addressed to Solomon as a report she prepared immediately after the incident. According to Erickson, the memo was typed by someone in human resources from handwritten notes she no longer had. Erickson was required to refer to this memo frequently during her testimony to recall the incident. Erickson also demonstrated a tendency to embellish the account of Stewart's conduct when not relying on the document. For example, she testified that Stewart was "laughing, like everything was a big joke" when she was speaking in the allegedly abusive manner, a detail left out of her report. Erickson also claimed, for the first time at the hearing, that Stewart used profanity in speaking to Horan. In her memo and on the witness stand, Erickson also claimed that she had verbally warned Stewart frequently, close in time to this incident, about her attitude, attendance, and other performance issues. However, she only cited as evidence of Stewart's poor record the warnings that Stewart had received more than a year before the incident and that had been superseded by the evaluation Erickson prepared in October 2001, noting improvement on these issues. Erickson, who had no part in the decision to terminate Stewart other than in preparing the memo, admitted being aware of Stewart's union activities during the campaign.

Horan testified that he made the decision to fire Stewart "on the spot" after the confrontation in the kitchen. Horan, while corroborating some of Stewart's testimony regarding how the incident arose, denied that he ever raised his voice or lost his temper, even while Stewart was challenging his authority. Horan also had a tendency to embellish his description of the event, claiming on the witness stand that Stewart used profanity, which he did not mention in his June 28 written report. Horan testified further that he based his decision on the incident

⁵⁶ As previously noted, Solomon was not called as a witness even though it is undisputed that she was still employed by the Respondent at the time of the hearing.

as well as on Stewart's past performance and "continual behavior patterns that I just couldn't tolerate anymore." However, like Erickson, he was only able to cite the old discipline from 2001 that had been superceded by the October 2001 evaluation. Although Horan conceded that he was aware of Stewart's union activities, he attempted to minimize the extent of it.

The General Counsel offered evidence, acknowledged by Erickson and Horan, that Stewart was not the first or only employee in the dietary department to have been involved in such an outburst. The Respondent's personnel records show that Isabel Alves, another dietary aide, had been noted to have "a hot temper and tends not to follow the directions and tasks given her by her supervisors" and, on another occasion, was said to have engaged in "disruptive behavior and creating an unsafe condition." Although Horan was admittedly aware of these incidents, having signed Alves' warnings, she was never terminated and was still working for the Respondent at the time of the hearing. Horan even conceded, on cross-examination, that Alves' performance had not improved in spite of the warnings in evidence. Horan admitted that Alves was not known to be a union supporter. Her sister, Maria Alves, was a shift leader in the department.

Applying the Board's *Wright Line* analysis, I find that the General Counsel has met his burden of proving that Stewart's union activities were a motivating factor in Horan's decision to discharge her over the toast incident. I find, initially, that Stewart was a more credible witness than either Erickson or Horan. Although Stewart may have had a tendency to become argumentative on cross-examination, I note that the Respondent cross-examined her at considerable length. Despite a blistering cross-examination, the Respondent's counsel was unable to shake her testimony, which was consistent throughout. In contrast, as previously noted, Horan and Erickson tended to exaggerate their testimony and appeared incapable of keeping their story straight. It is clear from Stewart's version of the June 28 incident that Horan provoked her and was at least equally abusive and hostile toward her. When the circumstances leading up to Horan's "on the spot" decision to terminate a relatively long-term employee are considered against the background of her strong union activity, the Respondent's knowledge and animosity toward that activity and the lenient treatment Alves received from the same supervisor for similar behavior, the discriminatory nature of Horan's decision becomes apparent. Rather than being a reasonable reaction to misconduct by a problem employee, the decision was nothing more than the Respondent seizing an opportunity to rid itself of one of the remaining key employees in the Union's unsuccessful campaign. Further supporting this conclusion is the fact that the Respondent dredged up old discipline to bolster its asserted reason for terminating Stewart. The documentary evidence establishes that whatever attendance or attitudinal problems Stewart had in 2000–2001 had been corrected by the time of her evaluation on October 1, 2001. The testimony of Erickson and Horan that these problems continued until June 2002 is simply not credible in light of the total absence of objective evidence to support it. In light of the strong *prima facie* case presented by the General Counsel, the Respondent's evidence is insufficient to prove that Stewart would have been fired over

the June 28 incident in the absence of union activity. The Respondent offered no evidence that it had terminated any other employee under similar circumstances and the evidence offered by the General Counsel proves that in fact it chose lesser forms of discipline when confronted with similar misconduct by another employee. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3), as alleged in the complaint, by terminating Stewart on July 1.

6. Alleged discrimination against the union's observers

The complaint alleges, at paragraph 23, that the Respondent violated Section 8(a)(1) and (3) of the Act on April 10 and 11 by denying the Union's election observers the right to work on the day of the election while permitting its observers to work that day. The testimony regarding this allegation is essentially undisputed. Stewart, Tawana Williams, and Jennifer McEachron were the Union's observers at the April 11 election. Williams testified that, on April 10, DiGangi, the assistant director of nurses, told her that she and the other election observers would have to take a vacation day or personal day in order to serve as observers. Athena McClennon, who had originally been scheduled to be an observer, testified to a similar conversation with DiGangi. McClennon chose not to serve as an observer after this conversation. Stewart testified that she was scheduled off on April 11, even though this would not have been a regular day off for her. In contrast, the Respondent's records show that all of its observers, Catherine Stewart, Ruth Rodriguez, Frederica Plummer, and Shantake Johnson, were on the clock on the day of the election. In fact, all except Johnson appeared at the election in uniform.

In defense of this allegation, the Respondent offered the testimony of DiGangi who claimed that all of the observers were told that they had to take the day off if they were going to serve as observers. According to DiGangi, it was Vice President Silverman who directed her to relay this message to the observers who were employed in the nursing department. When questioned regarding whom she called and what she said, DiGangi only recalled speaking to Williams and only recalled generally conveying the message that observers would have to take time off to serve at the election. There is no evidence in the record that any of the Respondent's observers received this message.

The Board, in *Big Three Industrial Gas & Equipment Co.*,⁵⁷ found a violation on almost identical facts. The Board, reversing the trial examiner, held that the employer's refusal to permit the union's observers to work on the day of the election, while permitting its own observers to work, interfered with the employees' exercise of their Section 7 rights in violation of Section 8(a)(1) and discriminated against them in regard to their terms and conditions of employment in violation of Section 8(a)(3). Although the court of appeals denied enforcement to the Board's order based on this unfair labor practice finding, it did so on the ground that the conduct was *de minimis* and did not warrant setting aside the election. Because the Board has never overruled *Big Three Industrial*, it is controlling precedent here. Those cases in which the Board has held that it is not unlawful for an employer to pay its witnesses in an NLRB hear-

⁵⁷ 181 NLRB 1125 (1970), enf. denied 441 F.2d 774 (5th Cir. 1971).

ing, but not witnesses subpoenaed by a union or the General Counsel, their lost wages are inapposite. See *Electronic Research Co.*, 190 NLRB 778 (1971) (*Electronic Research II*). Cf. *Electronic Research Co.*, 187 NLRB 733 (1971) (*Electronic Research I*). The Board has noted the distinction between the payment of witness fees and an employer's distinguishing between its employees in their employment relationship on the basis of whether they were summoned as witnesses by it or by the opposition and has found the latter to be unlawful discrimination because it punishes employees for engaging in activity protected by the Act. *General Electric*, 230 NLRB 683, 684-686 (1977). Accordingly, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act as alleged in paragraph 23 of the complaint.

D. The Union's Election Objections

The Union filed timely objections to conduct affecting the results of the election, most of which parallel the unfair labor practice allegations of the complaint. I have already found above that the Respondent committed the following violations of Section 8(a)(1) of the Act during the critical period between the filing of the petition on March 1 and the April 11 election:

1. The maintenance of overly broad rules restricting employees' protected solicitation and/or distribution activities during non-work time or in non-work areas, denying off-duty employees access to the facility, and prohibiting employees from discussing their wages, benefits or other terms and conditions of employment or even talking about the Union while at work (Objections 3 and 6).⁵⁸

2. Supervisor Laidlaw creating the impression of surveillance on March 5 by observing Tawana Williams getting into a car in the parking lot and calling Williams' immediate supervisor to question where she was going and who she was with; and engaging in actual surveillance on April 5 by pulling Artarene Thompson out of Glickman's meeting with employees, followed by the accusation that Thompson was tape recording the meeting (Objection #1).

3. Supervisor Pryor creating the impression of surveillance on March 27 when he accused Gauthier of engaging in union activity while on the clock, describing a report he had received of Gauthier's activities the night before (Objection #1).

4. Threatening employees with closure of the facility and the loss of jobs through posters displayed during March and April and through Magid's and Glickman's speeches to employees in late March and early April (Objection #5).

5. By memos and speeches in the period March 29 through April 2, Magid impliedly promised employees improved terms and conditions of employment if they rejected union representation (Objection #13).

6. On March 26 and March 27 when supervisors Valencia and Pryor instructed Gauthier to distribute the Re-

spondent's campaign propaganda to other employees (Objection #16).

7. Laidlaw's interrogation of and threats of job loss directed to Dyer on April 5 (Objection #16).

I have also found that the Respondent violated Section 8(a)(3) of the Act, during the critical period, by imposing more onerous working conditions on and denying a reference to Ayala, by terminating Gauthier on April 10, and by refusing to permit the Union's observers to work on the day of the election while permitting its observers to work (Objections 7 and 8).

The Board has long held that it will set aside an election where one party engages in conduct which could have the reasonable effect of destroying the "laboratory conditions" necessary to ensure that employees have the opportunity to make an uninhibited choice on the question of representation. *General Shoe Corp.*, 77 NLRB 124, 127 (1948). Conduct may be objectionable even where it does not rise to the level of an unfair labor practice. Conversely, conduct which violates the Act is, a fortiori, conduct which interferes with an election unless it is so de minimis that it is virtually impossible to conclude that the violation could have affected the results of the election. *Airstream, Inc.*, 304 NLRB 151, 152 (1991); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). The unfair labor practices found above could hardly be called de minimis. Accordingly, I shall sustain the Union's Objections 1, 3, 5-8, 13, and 16. No evidence was presented in support of Objection 2 and the only unfair labor practice found consistent with Objection 4, Laidlaw's solicitation of employees to revoke their authorization cards in late October 2001, occurred long before the filing of the petition. I shall recommend that these objections be overruled.⁵⁹

The Union filed four additional objections which do not parallel the complaint but which have been consolidated with the complaint for hearing. As the objecting party, the Union has the burden of coming forward with evidence to support these objections. *Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982). The Union offered substantial evidence in support of only two of these objections, which will be discussed infra. The only evidence offered in support of Objection 10, alleging that the Respondent or its agents "bribed" employees to vote against the Union, and Objection 12, alleging that the Respondent promoted three union supporters into "leadership positions," was hearsay, gossip, or conjecture. Because I find that the Charging Party has not carried its burden as to Objections 10 and 12, I shall overrule these objections.

Objection 9

In this objection, the Union alleges that the Respondent, on April 10 and 11, "organized, allowed and paid eligible voters, at least some of whom were on duty at the time, to picket the entrance of the facility holding 'Vote No' and other signs with

⁵⁸ I have also found at least one instance of enforcement of these rules during the critical period, i.e., Supervisor Wargo's instruction to Ayala that he could not talk about the Union at work.

⁵⁹ The Board has considered pre-petition conduct when ruling on objections, where such conduct "adds meaning and dimension to related postpetition conduct." *Dresser Industries*, 242 NLRB 74 (1979). Here, it is unnecessary to consider any unfair labor practices that occurred before March 1 because there are ample grounds to overturn the election based on conduct occurring during the critical period.

various anti-union slogans.” The evidence, some of which has been described above, establishes that, on April 10, two groups of employees staged competing rallies at the base of the driveway leading into the Respondent’s facility.⁶⁰ A group of union supporters, including nonemployees, apparently arrived first and began handbilling as employees arrived for the second shift. At about 2:30 p.m., a group of employees, many in uniform, came down the hill from the Respondent’s facility and proceeded to demonstrate on the opposite side of the driveway from the Union’s supporters. This group of employees carried signs urging employees to “Vote No” in the election. The parties stipulated that 24 unit employees, all but 2 of whom worked in the dietary department, participated in the “Vote No” rally and that the rally lasted at least until 3:15 p.m.⁶¹ Of these 24 employees, seven were not scheduled to work, or were scheduled to start work later; 10 employees ended their work day and punched out approximately 30 minutes early; 5 employees extended their breaks, by as much as 30 minutes, to participate in the rally; and 2 employees who were on duty at the time did not punch out before joining the demonstration. The testimony of the Respondent’s witnesses reveals that only two employees who punched out early made a request to do so. There is no evidence in the record that any of the other employees on duty sought or were granted permission to leave early or extend their breaks. The testimony of the witnesses from both sides clearly shows that the Respondent’s dietary supervisors, including Director Horan, were aware that employees who were scheduled to work were participating in the rally.

Melissa Quarles, a dietary aide, testified for the Union that she observed some of these employees making signs and otherwise preparing for the demonstration in the kitchen before they punched out. Quarles testified further that after the employees left to participate in the rally her supervisor, Wargo, asked her to complete the assignments of two of the employees who participated in the “Vote No” rally. According to Quarles, she also observed that a third employee who left early had not completed his assignment, i.e., sweeping the floors and emptying the garbage. Wargo, who testified for the Respondent, denied asking Quarles or any other employee to complete the work assignment of employees who left early that day. Wargo did testify, as did the other dietary supervisors, that an employee who desires to leave work early must complete their assignment before leaving.

The Respondent’s witnesses all admitted that employees must obtain permission from a supervisor before leaving work early or extending their break, as the employees did here. As noted above, Horan recalled only two of the employees asking him for permission and Wargo, Caplan, and Erickson denied being asked by any of the other employees for permission. The Respondent’s witnesses, while testifying that it was not unusual for employees to leave early or extend their breaks, with per-

mission, conceded that they were unaware of any other occasion when so many employees left work early or in the middle of their shift at the same time.

Although there is no evidence that the Respondent actively planned or supported the “Vote No” rally, the evidence does convince me that the Respondent at least gave its tacit approval to the employees by allowing so many of them to leave work early or take extended breaks to participate in it. Moreover, the dietary department employees who participated in the rally were so open about their activity, making signs in the kitchen and gathering as a group to leave, that the Respondent was on notice as to their activities. I credit Quarles’ testimony that some of these employees who were allowed to leave early had not even completed their work before leaving for the day, a departure from the Respondent’s policies and procedures. Although there is no dispute that all but two of the employees were on their own time when they participated in the rally, it is also true that Horan and the other supervisors made no effort to ensure that this was the case. In fact, the two employees who failed to punch out were paid for their time at the rally and suffered no discipline for this abuse of company time. I do not agree with the Respondent that this was an inadvertent mistake. It was apparent from the punch detail report that these two employees had not punched out and Horan, who reviews these reports on a regular basis, made no effort to correct them.

Based on the evidence in the record, I find that the Union has met its burden of proving that the Respondent at least condoned the anti-Union rally and lent logistical support in the form of the mass grant of time off and the failure to correct the punch report for those two employees who had not punched out. By doing so, the Respondent would lead employees to reasonably believe that employees who opposed the Union could expect to receive more lenient treatment regarding attendance at work. Such conduct has the tendency to interfere with employee free choice in the election and is thus objectionable.

Objection 15

In this objection, the Union claims that the Respondent, during the critical period, hired management consultants who “misrepresented to employees that they were agents of the National Labor Relations Board and disinterested parties to the election. The consultants reinforced this claim that they were agents of the Board by distributing Board issued material to eligible voters.” There is no dispute that the Respondent hired a company called Direct Labor Training (DLT) to assist it during the preelection campaign. There is also no dispute that representatives of DLT conducted meetings for the Respondent’s employees during the critical period. Five witnesses testified for the Union regarding these meetings, i.e., Stewart, Tawana Williams, Helen Wright, Lozada, and Misty Hinds. The Respondent questioned one supervisor, Sandy Peralta, and its human resources administrator, Jackson-Holland, regarding this issue. The Respondent did not call any of the DLT representatives who met with the employees to rebut the testimony of the Union’s witnesses.

Based on the testimony of the Union’s witnesses, who attended different meetings, it appears that the format of these meetings was similar. The employees were asked to attend the

⁶⁰ Although the objection alleges identical conduct occurring on April 11, the day of the election, almost all of the testimony offered relates to April 10.

⁶¹ Punch detail reports for these employees in evidence show that those who returned to work after the rally did not punch in until 3:40 p.m. or later.

meetings by their immediate supervisor, the meetings were held in a conference room, approximately 10–20 employees were present at each meeting and the meeting began with a supervisor or human resources representative introducing the DLT consultants. The Respondent's supervisor or representative left the room after the introduction. Stewart testified that a Spanish gentleman who spoke at her meeting told the employees that he was "from the labor board." The DLT consultants distributed the "Basic Guide to the National Labor Relations Act," an NLRB publication, to the employees. When Stewart asked the speaker what part of the labor board he worked at, the man replied, "[W]ell, I do not work for the labor board, I work with the labor board, I'm with direct labor." According to Stewart, the man then told the employees that he was not there for the Union, nor for the Respondent, that he was there for the workers, to help them "read between the lines on what the Union was promising and offering us." Williams' testimony regarding the meeting she attended was similar. She recalled that the speaker introduced himself as Manny Gonzalez and said he was from the labor board. The basic guide was also distributed at the meeting she attended. According to Williams, it was only after the meeting had ended and the other employees had left the room that Gonzalez told Williams, when she asked him for his business card, that he was from DLT. Williams testified that during the meeting, Gonzalez only made negative comments about unions. Wright's testimony was consistent with Stewart and Williams. At the first meeting she attended with DLT representatives, they never identified themselves as anything other than labor board representatives. Only at a second meeting she attended, a week or two later, did the DLT speaker tell employees, in response to an employee's question, that they were not from the labor board but were being paid by the Respondent. The testimony of Hinds and Lozada was also consistent with that of the other witnesses.

Jackson-Holland, who testified for the Respondent, testified that she attended several meetings at which she introduced the DLT consultants to the employees. She denied that the consultants told the employees that they were from the labor board. Supervisor Sandy Peralta, who also introduced the consultants at several meetings, testified that she introduced the DLT consultants by name and told employees that they were going to explain the pros and cons of joining a union. Peralta admitted leaving the meetings after making this introduction. The Respondent also put in evidence a flyer advising employees that it had "invited some experts on human resources and labor relations issues to join us over the next few weeks. This group is not part of the union, the government, or the Jewish Home. You can get straight talk from them." Although this flyer, unlike other flyers that were posted or distributed by the Respondent during the campaign, does not contain the express statement that it was "distributed by the Jewish Home for your information," it does bear the Respondent's logo. Williams testified that she did not recall receiving or seeing such a flyer during the campaign.

I credit the Union's witnesses that the DLT representatives made statements and engaged in conduct that conveyed to the employees that they were "from the labor board." Because neither Peralta nor Jackson-Holland were present during the

actual meetings, their testimony does not really contradict that of the Union's witnesses. I shall draw an adverse inference from the failure of the Respondent to call as witnesses any of the DLT representatives who did speak at these meetings. See *Queen of the Valley Hospital*, 316 NLRB 721 (1995). I also find, based on the testimony of the Union's witnesses, that this ruse was not successful because, when confronted by employees, the DLT consultants admitted that they were in fact consultants hired by the Respondent. Although all of the employees may not have seen the flyer announcing the hiring of DLT, employees would have been able to discern from the tenor of the statements made by DLT's representatives and from their admission when pressed as to their identity, that they were speaking for the Respondent and not for the NLRB. While the DLT representatives may have endeavored to misrepresent their affiliation, they did not succeed. Accordingly, I find that the Union has not met its burden of proving that the Respondent, through the actions of DLT, engaged in objectionable conduct. I shall recommend that Objection 15 be overruled.

E. Unit Placement Issues

Although the parties stipulated prior to the election as to the appropriateness of a service and maintenance unit and as to the unit placement of a number of job classifications, the parties disagreed as to the placement of four classifications at the hearing. Because resolution of this issue is necessary not only for determination of majority status under the General Counsel's request for a *Gissel* bargaining order, but also for the direction of any rerun election that may result based on the Union's objections, I shall address this question now. The Respondent seeks to include in the unit the following groups of employees: two preschool and seven childcare teachers who work in the childcare center; two resident bankers in the fiscal services department; nine therapeutic recreation directors (TRDs); and one or two admissions associates.

Teachers

The Respondent operates a childcare program for children aged 3 months to 5 years. The Respondent's program is open to children of employees and the general public. The childcare center is housed in a separate building next to the Kuriansky Pavilion. Elicia Kusnitz, the current director of the center, testified at the hearing regarding this issue. She reports to Vice President of Health Services Rotella-Soderberg. At the time of the election, the Respondent employed seven childcare teachers who worked with children from 3 months to 2 years old; two preschool teachers who worked with children from 3 to 5 years old; and two assistant teachers who were included in the unit by agreement of the parties. The teachers are responsible for planning and overseeing the daily program for children in their respective age group and interacting with the parents. The assistant teachers participate in implementing the program and supervising the children's activities, receiving direction from the teachers.

Kusnitz testified that the Respondent prefers to hire individuals who have at least a 2-year college degree for the position of childcare teacher. The minimum requirement, however, is a CDA certification and/or nine college credits in early

childhood education. To obtain a CDA certification, a teacher must complete 1000 hours of clinical training and certain specialized college-level classes. Kusnitz has promoted an experienced assistant teacher into the position of childcare teacher even though the individual lacked either a college degree or CDA certification. According to Kusnitz, the individual was required to work towards obtaining the CDA certification as a condition of the promotion. Because preschool teachers have more responsibility, the minimum requirements are greater. According to Kusnitz, the educational requirement is a bachelor or associates degree in one of three specialized fields of study. Both positions also require 1 to 2 years of relevant work experience and 20 hours of in-service training, which may be received on-site. In contrast, an individual seeking a position as an assistant teacher needs only a GED or high school diploma with no prior work experience. There is no evidence that any other employees in the service and maintenance unit are required to possess any particular educational or experience prior to employment, although the CNAs are required to be certified after a period of training.

The Respondent's childcare and preschool teachers are paid on an hourly basis and receive the same benefits package as unit employees. Kusnitz testified that the rate of pay for childcare teachers is about \$11 an hour, that for preschool teachers is about \$12 an hour and for assistant teachers \$10 an hour. Jackson-Holland, from the Respondent's human resources department, testified that the range of pay for teachers in the childcare center was between \$10 and \$16 an hour. These rates are similar to those received by many employees in the stipulated unit, in particular the CNAs and cooks. The teachers in the childcare center go through the same general orientation for new employees as unit and nonunit employees, although they also have their own orientation within the center. They are subject to the same rules, punch a timeclock, use the same cafeteria, and other facilities as unit employees. The Respondent posts vacancies in teacher positions and unit employees may apply for these positions if they meet the requirements. Similarly, employees in the childcare center may bid on vacancies in other areas of the Home. Other than the promotion of assistant teachers to one of the teacher positions, there is no evidence of any other transfers between unit positions and these teacher positions. Kusnitz testified that the teachers interact on a daily basis with the assistant teachers in the unit and interact less frequently with other unit positions when, for example, CNAs transport residents to activities with the children. There is opportunity for further interaction between the teachers and unit employees in the cafeteria, at staff meetings, and when interacting with unit employees whose children attend the childcare center.

The Respondent argues that the childcare and preschool teachers should be included in the unit because they share a sufficient community of interest with other employees included in the stipulated service and maintenance unit. The Respondent emphasizes the similarity in pay and benefits, working conditions, and interaction with unit employees, most notably the assistant teachers, as grounds for including these teachers in the unit. The Union argues that the childcare and preschool teachers are technical employees whose specialized skill and training outweigh the community of interest factors cited by the Re-

spondent. The General Counsel took no position on the unit placement of these employees. In *Park Manor Care Center*,⁶² the Board held that, in making unit determinations in nonacute care facilities like the Respondent, it would apply "a pragmatic or empirical community of interests approach," utilizing background information gathered during the Board's hospital unit rulemaking proceeding and prior case precedent involving the specific unit being sought or the particular type of facility involved. The Board has held, in subsequent cases, that there is no automatic exclusion for technical employees from non-professional units of employees in a nursing home. As the Board has stated, whether or not technical employees constitute a separate appropriate unit depends on their relationship with other non-professional employees. *Hillhaven Convalescent Center of Delray Beach*, 318 NLRB 1017 (1995).

Considering the evidence in the record, I find that the Respondent's childcare and preschool teachers are technical employees, rather than service and maintenance employees. They possess specialized training, which they apply, using independent judgment, in devising the daily program for the children under their care. Although they may work side by side with the assistant teachers, they are the ones who essentially direct the assistant teachers to carry out the program they have designed. They are more highly skilled than most of the employees in the unit and have more independence in performing their duties. These factors outweigh the factors relied on by the Respondent as demonstrating a community of interest with the stipulated unit employees. I note that the same argument advanced by the Respondent for inclusion of the teachers could be applied to the LPNs, whom the parties have agreed should be excluded from the unit. The LPNs are hourly paid, punch a time clock, receive the same benefit package as unit employees, have frequent interaction with unit employees and are subject to the same personnel policies and rules and regulations. Like the teachers, they had specialized training, licensing requirements, and use independent judgment in carrying out their patient care duties. Thus, the teachers in the Respondent's childcare center would more appropriately be included in a unit with other technical employees like the LPNs. The fact the rate of pay received by the teachers is similar to that received by the CNAs and certain other unit employees does not outweigh the difference in their educational requirements, training and skills utilized in the performance of their jobs. Accordingly, I shall recommend that the childcare teachers and preschool teachers be excluded from the unit. *Hillhaven Convalescent Center of Delray Beach*, supra; *Lincoln Park Nursing & Convalescent Center*, 318 NLRB 1160 (1995).

Resident Bankers

The Respondent operates a residents' bank, located on the first floor of the Tandet Building, which serves as the depository for residents' personal funds. The residents can make deposits and withdrawals as they would at a typical bank. The two resident bankers in dispute spend most of their workday, which is 8 a.m. to 4:30 p.m., in the resident bank. They are part of the department of fiscal services, under the direction of Joan

⁶² 305 NLRB 872 (1991).

Fisher, which also employs accounts payable, payroll, and billing clerks. No other employee in this department was included in the stipulated unit. When not in the resident bank, the resident bankers work in the fiscal services office, located in the Kuriansky building, performing accounting functions related to the bank. In addition to handling residents' funds, the resident bankers have paperwork duties related to Medicare and Medicaid eligibility of the residents.

Fisher testified that the resident bankers, who are hourly employees, are paid in the same general range as the CNAs included in the unit, i.e., approximately \$10 to \$16 an hour. Jackson-Holland testified that the resident bankers' wage rate is the same as that for cooks in the dietary department, i.e., from \$9.50 to \$15 an hour. The resident bankers receive the same benefits as other employees, go through the same general orientation, and interact with other employees in the cafeteria and at staff meetings. They also have occasional interaction with CNAs when a CNA escorts a resident to the bank to conduct business. Although resident bankers may bid on vacancies in other positions within the stipulated unit and vice versa, there is no evidence that any transfers between these positions and unit positions have ever occurred. The only educational requirement to be hired as a resident banker is a high school diploma.

Although the parties agree that the stipulated unit excludes business office clerical employees, they disagree as to whether the resident bankers fall into this classification. The Respondent contends that they should be included in the service and maintenance unit in the same way that unit clerks, department secretaries and receptionists are. The Union argues that the resident bankers should be excluded along with the rest of the fiscal services department employees. The Board, in *Lincoln Park Nursing & Convalescent Center*, supra, noted that it has traditionally distinguished between business office clericals and other clerical employees in healthcare settings, consistently including the latter in service and maintenance units where they have regular contact with unit employees. The Board has described the functions of business office clericals as follows:

Handling finances and billing, and dealing with Medicare, Medicaid, and other reimbursement systems. Business office clericals are generally supervised separately in business office clerical departments Business office clericals have little interaction with other nonprofessionals as the business office clerical offices are often physically isolated.

Id. at 1164, citing *Rhode Island Hospital*, 313 NLRB 343, 359 (1993).

I find, based on the evidence in the record, that the two resident bankers are business office clerical employees whom the parties intended to exclude from the stipulated unit. While they may share some similarities with service and maintenance employees with respect to their wages, benefits, and general working conditions, they are functionally part of the fiscal services department, which is separately supervised and isolated from patient care areas of the home. The interaction they have with the residents and an occasional CNA is incident to their role as fiscal service employees, not part of the Respondent's patient care regimen. Accordingly, I shall recommend that the resident bankers be excluded from the unit.

Therapeutic Recreation Directors (TRDs)

The Respondent's therapeutic recreation department, located in the lower level of the Tandet building, is responsible for leading group activities and one-to-one activities for the 360 residents of the home. Therapeutic recreation is an integral part of the residents' care plan. Ellen Ashkins, the department director, testified regarding this group of employees. At the time of the election, the department employed, in addition to the director, an assistant director, a supervisor, a resident computer lab instructor, the nine TRDs at issue, four therapeutic recreation assistants, and three therapeutic recreation transporters who were included in the stipulated unit. Ashkins and the assistant director have offices, while the supervisor and the TRDs have desks located in the department.

The TRDs are responsible for planning, leading, and co-leading recreational activities for the residents as required by the State of Connecticut Public Health Code and Federal Regulations,⁶³ completing documentation required to satisfy the regulations and to obtain reimbursement, and attending care plan and family meetings with other members of a resident's interdisciplinary team. The care plan team for each resident generally includes a nurse manager and a social worker. Only TRDs may complete the resident paperwork documenting assessment and provision of care. Although a therapeutic recreation assistant in the process of being certified as a TRD may also fill out such paperwork, Ashkins, the Director, would have to co-sign the form. According to Ashkins, the forms that TRDs fill out require evaluating, designing, and implementing individualized treatment for each resident.

There are two subclassifications of TRDs employed by the Respondent: recreation therapists, who are required to have a minimum of a bachelors degree and certification from the Connecticut association of therapeutic recreation directors and therapy associates, who are required to have obtained, at the minimum, certification by the association. Some of the therapy associates also have associates' degrees. To be certified by the association, an employee must complete both the clinical and classroom components of a specialized program, which includes six to eight college level courses in the field. An employee who transfers into the TRD position cannot work as a TRD until they obtain their certification. According to Ashkins, the job duties of the TRDs are the same, regardless of subclassification. Ashkins testified that the starting rate is \$14.35 an hour for a TRD (therapist) and somewhere between \$12 and \$13 an hour for a TRD (associate). TRDs can earn as much as \$20 an hour, with raises. The starting rate for the therapeutic recreation associates in the stipulated unit, who are only required to have a high school diploma or GED, is about \$10.35 an hour. The transporter's starting rate, which was not identified, is lower than this.

The TRDs generally work Monday to Friday. They are not required to wear a uniform but must dress "professionally" in accordance with the department dress code. They receive the

⁶³ The Respondent is required to provide "therapeutic recreation" for each resident. Each resident's chart must include a section for this element of their care and each resident, on admission, must be assessed by the department for their individual recreation needs.

same benefits as other hourly employees, punch a timeclock, attend the same staff meetings, use the same parking lot and cafeteria and interact with unit employees when working with residents. Vacancies in TRD positions are posted company-wide and TRDs are also able to bid on vacancies in other areas of the home. However, transfers between TRD positions and unit positions are rare because of the educational and certification requirement. Ashkins herself was promoted from a TRD position to director and another TRD became the Respondent's director of social services. In addition, there is evidence that one of the TRDs was formerly a CNA and that two other TRDs had worked as transporters and associates within the department before becoming a TRD.

The Respondent argues for inclusion of the TRDs in the unit on community of interest grounds, emphasizing similarities in wages, benefits and working conditions, and interaction with unit employees when providing treatment to residents. The Union argues that TRDs, like the teachers in the childcare center, should be excluded as technical employees, regardless of any similarities in wages, etc. Applying the test announced by the Board in *Park Manor*, supra, I find that the TRDs meet the Board's definition of a technical employee and that any "community of interest" they share with unit employees is outweighed by the higher skill, independent judgment and higher pay they receive. Their interests are more aligned with the nurses, RNs, and LPNs, who are excluded from the unit, because they use their education, training and skills on a daily basis to independently assess and meet the needs of residents under their care. Accordingly, I shall recommend that the TRDs be excluded from the stipulated service and maintenance unit.

Admissions Associate

The admissions associate works in the department of continuing care and outcomes management. Nicole Alaimo, the director of the department, testified regarding this issue. Alaimo reports to Rotella-Soderberg, the vice president for health services. The department handles preadmission screening, reimbursement management, and patient care management from admission to discharge. The department has several offices in the Bennett building and the admissions associate works in one of these offices on the first floor. According to Alaimo, the admissions associate's job duties include clinically assessing and prescreening applicants for long-term admissions, preparing paperwork to obtain Medicare, Medicaid or other reimbursement for care, assisting and advising residents and their families regarding eligibility for government benefits. The admissions associate works Monday through Friday from 8 a.m. to 4:30 p.m. and spends most of the day in the office. At the time of the election, there was one full-time admissions associate, Ellen Lockwood, a salaried employee who was paid approximately \$42,000 an year. Lockwood had previously worked as a secretary in the front office. The Respondent also employed a per diem admissions associate, Arlene Gordon, who was paid hourly, at the rate of \$16 an hour, and punched a

clock.⁶⁴ Jackson-Holland, from the Respondent's human resources department, testified that the rate of pay for this position could be as high as \$23 an hour. The only requirement for the position is a high school diploma or GED.

The admissions associate receives the same package of benefits as other hourly employees, including those in the unit, is subject to the same personnel policies and rules, attends a similar new employee orientation, may use the cafeteria, and attends in-service and staff meetings with other employees. However, according to Alaimo, the admissions associate has very little contact with unit employees in the course of her work. Most of the time, the admissions associate interacts with nonunit employees in the fiscal services and medical records department. Although she may occasionally have contact with a CNA when visiting a resident or family member on one of the floors, the contact would be minimal. Similarly, although admissions associates may participate in the job posting and bidding process, there is no evidence of any transfers between this position and any unit position.

The Respondent, again relying on "community of interest" factors, argues for inclusion of the admissions associate in the unit. The Union contends that this position should also be excluded as a business office clerical, which the parties, in their stipulation, agreed to exclude. Having considered the evidence, I agree with the Union that the admissions associate meets the definition of a business office clerical and shares very little in common with the employees included in the stipulated unit. I note, in particular, the relatively high salary that the main incumbent of this position receives as a factor against inclusion.⁶⁵ Accordingly, I shall recommend that the admissions associate be excluded from the unit.

F. The Request for a Bargaining Order Remedy

The Board's test for evaluating the appropriateness of a bargaining order as a remedy for an employer's preelection unfair labor practices has been stated as follows:

In *Gissel*, supra, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair labor practices' ('category I') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process' (category II)." The Court found that, in determining a remedy in category II cases, the Board can take into consideration the extensiveness of an employer's unfair labor practices in determining whether the "possibility of erasing the effects of past practices and ensuring a fair election . . . by use of traditional remedies, though present, is slight and employee sentiments once expressed by authorization cards would, on balance, be better protected by a bargaining order."

⁶⁴ Alaimo testified that Gordon worked, "as needed" to fill in for vacations, or when there were a lot of admissions, but that generally there would be only one admissions associate working at a time. She recalled that, in March, before the election, Gordon was working close to 40 hours a week because Lockwood was on leave.

⁶⁵ It is unclear from the record whether Gordon, the per diem, worked on a sufficiently regular basis before the eligibility date to be included even if the position were properly part of the unit.

Michael's Printing, Inc., 337 NLRB 860 (2002), and cases cited therein. See also *Parts Depot, Inc.*, 332 NLRB 670 (2000); *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993), enf. denied sub nom. *J.L.M., Inc. v. NLRB*, 31 F.3d 79 (2d Cir. 1994). Among the factors considered by the Board when applying this test are the number of employees directly affected by the unfair labor practices, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999). The Board must also be mindful of the important congressional policy underlying the Act which favors employee free choice of a bargaining representative through a secret-ballot election conducted under the Board's auspices. See *Dessert Aggregates*, 340 NLRB 289, 294 (2003).

Conceding that this is not a category I case, the General Counsel argues that the Respondent's "extensive" unfair labor practices warrant issuance of a remedial bargaining order, citing four factors:

- (1) the massive number of serious Section 8(a)(1) violations, including "hallmark" plant closing threats, which affected a majority of the bargaining unit;
- (2) the "hallmark" nature of the terminations of four employees for their union activity;
- (3) the significant number of unit employees directly affected by all of the alleged violations; and
- (4) the timing of much of the alleged unlawful conduct, such as the Dyer and Gauthier discharges occurring within mere days of the election.

The General Counsel's argument is undercut somewhat by my failure to find that the Respondent committed all of the unfair labor practices alleged in the complaint, including my recommendation that the allegations regarding the discharge of Dyer be dismissed. However, the record does establish, as I have found, that the Respondent committed a number of serious and pervasive unfair labor practices. Most notable is the threat of closure of the facility and job loss contained in the poster displayed in the facility within weeks of the election and communicated to employees by the chairman of the Respondent's board of directors at meetings with the employees within a week of the election. In addition, I have found that the Respondent discriminatorily terminated one of the leaders of the organizing drive, Gauthier, on the day before the election. There is testimony from at least one of the General Counsel's witnesses that Gauthier's discharge was a topic of conversation among the employees at the time of the election. Other violations found which affected the entire unit involved the Respondent's maintenance of unlawfully broad and discriminatory rules restricting employees' exercise of their protected activities; the December 2001 wage increase; and Magid's memos to the employees in late March early April impliedly promising improved terms and conditions based on the consultant's study. All of the other unfair labor practices were directed at individuals or small groups of employees, or occurred early in the Union's organizing drive. Only one unfair labor practice has been found to have occurred after the election, i.e., the termination of another of the union leaders, Stewart, on July 1. The question

presented here is whether these unfair labor practices can be remedied and the Union's strength restored without a bargaining order so that a rerun election will provide a meaningful opportunity for the employees to freely express their choice of bargaining representative.

In considering this issue, I note initially that the General Counsel concedes that the Union still had the support of a majority of the Respondent's employees as late as March 1, when the demand for recognition was made and the petition filed. If that is the case, then the violations which preceded that date, such as the December 2001 wage increase, cannot be said to have undermined the Union's majority support. I will thus focus on the unfair labor practices found that occurred after March 1. The most serious of these is the threat of closure, long considered by the Board to be a "hallmark" violation sufficient to warrant a remedial bargaining order. *Aldworth Co.*, 338 NLRB 137 (2002). Cf. *Aqua Cool*, 332 NLRB 95, 97 (2000) (threat of closure not enough to warrant *Gissel* remedy where this was only "hallmark" violation found). The discharge of a union activist like Gauthier is also a "hallmark" violation that the Board has frequently relied upon to support a bargaining order. *Aldworth Co.*, supra. Cf. *Pyramid Management Group, Inc.*, 318 NLRB 607 (1995) (the unlawful discharge of two union supporters, in the absence of other hallmark violations, not enough for a bargaining order). The fact that Glickman, the highest ranking official of the Respondent, committed the most serious of the unfair labor practices is another factor that the Board would consider as warranting this extraordinary relief. *Aldworth Co.*, supra. Despite the presence of these and other factors cited by the General Counsel, I am not prepared to conclude that the chances of holding a fair rerun election are so slight that a bargaining order is the only effective remedy.

In deciding against a *Gissel* remedy here, I note the large size of the unit, approximately 400 employees, as a factor long-recognized by the Board as diluting the impact of even the most serious unfair labor practices. See *Beverly California Corp.*, 326 NLRB 232 (1998); *Philips Industries*, 295 NLRB 717, 718-719 (1989). See also *Pyramid Management Group*, supra. Most of the unlawful conduct here affected only a handful of employees. The wage increase, which affected the entire unit, occurred before the General Counsel claims the Union lost majority support. The threat of closure, which was widely disseminated, can be effectively remedied by the special remedies I will be recommending. Moreover, I note that Glickman's statements and the posters did not directly threaten closure, but only implied such a result from unionization. While still serious, this is not the type of direct threat that the Board has often relied upon to support a remedial bargaining order. Finally, the discharge of one of the leading union adherents in a unit of this size, where other strong union supporters like Tawana Williams and Artarene Thompson, suffered no adverse consequences, is not enough to warrant a bargaining order, particularly where the discharge involved a mixed motive. Because Gauthier was not entirely blameless in the circumstances leading to his discharge, the tendency of other employees to interpret his discharge as an assault on union supporters generally is lessened. Unlike the situation in *Aldworth Co.*, supra, a case relied on by

the General Counsel, no management official here publicized the discharge as having been motivated by protected activity.

Other factors which have convinced me that a bargaining order is not necessary to remedy the unfair labor practices found here is the fact that only one violation occurred after the election. This is not a case where an employer, not satisfied with a victory in the election, continues a campaign of unlawful conduct to destroy any lingering union sentiment. Because of this lack of continuing unlawful conduct, and the passage of time, the traditional Board remedies, with some additional relief to be ordered, should be sufficient to restore the laboratory conditions necessary for a fair rerun election. In this regard, although not a factor relied upon by the Board, I note that some of the high-ranking management officials involved in the prior unfair labor practices are no longer employed. Thus, Magid, the Respondent's president who essentially directed the anti-union campaign, has retired, and Silverman, the vice president involved in enforcement of the unlawful no-access rule and other conduct, has moved on to other employment. Although Glickman was still the chairman of the board at the time of the hearing, my recommendation that he read the notice to the employees, to be discussed infra, should dissipate any lingering effect from the unlawful threats he made at the meetings he held before the election.

Accordingly, based on the above, I shall not recommend the issuance of a remedial bargaining order based on any card majority obtained by the Union before March 1, 2002. Based on this recommendation, I find it unnecessary to resolve the issues raised by the Respondent as to the validity of some of the cards or the authenticity of some signatures. Based on the unfair labor practices and meritorious objection found above, I shall recommend that a new election be conducted after the Respondent has remedied the violations found.

CONCLUSIONS OF LAW

1. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

(a) Maintaining overly broad solicitation and distribution rules that restrict employees right to engage in protected concerted activities during nonworktimes and/or in nonwork areas that are not immediate patient care areas.

(b) Maintaining and enforcing an overly broad rule denying off-duty employees access to the Respondent's facility.

(c) Maintaining an unlawful rule prohibiting employees from discussing their wages, benefits, and other terms and conditions of employment with their fellow employees.

(d) Telling employees that they may not talk about the Union during work while permitting employees to discuss other non-work-related subjects.

(e) Creating the impression among employees that their protected concerted activities were under surveillance and engaging in actual surveillance of employees who were engaged in protected concerted activities.

(f) Providing unlawful assistance and encouragement to employees to revoke their signed union authorization cards by requesting employees to see a supervisor if they wanted to do so and by offering to stamp and mail employees' revocations.

(g) Interrogating employees regarding their union membership, activities, and support.

(h) Threatening employees with closure of the facility, job loss and other adverse consequences if they selected the Union as their collective-bargaining representative.

(i) Granting employees a wage increase in order to influence their choice of bargaining representative.

(j) Promising employees additional wage increases and implying that working conditions would improve if they rejected union representation.

(k) Requiring employees to engage in antiunion activities.

2. By imposing more onerous working conditions on Juan Ayala and denying Ayala a recommendation, and by terminating Farid Gauthier on April 10 and Ebonie Stewart on July 1, 2002, because of their membership in and activities in support of the Union, the Respondent has discriminated against its employees in violation of Section 8(a)(3) and committed unfair labor practices affecting commerce as defined in Section 2(6) and (7) of the Act.

3. The Respondent has not violated Section 8(a)(1), (3), or (5) of the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that the Respondent rescind the various unlawful rules contained in its employee handbook and personnel policies and notify its employees that these rules are no longer in effect. I shall also recommend that the Respondent be ordered to post and abide by a notice to employees, attached hereto as appendix B. Having found that the Respondent discriminatorily discharged Gauthier and Stewart, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Because the assignment of more onerous working conditions to Ayala had ended before the hearing, and because there is no evidence that Ayala still needs a recommendation from the Respondent, I shall not recommend any affirmative relief for these violations. However, should Ayala require a recommendation now or in the future, the Respondent shall not discriminatorily withhold it from Ayala under the cease-and-desist provisions of the recommended Order.

As noted above, I have found that a bargaining order is not necessary to remedy the unfair labor practices found here. However, certain additional remedies, aside from those traditionally ordered in cases such as this, are necessary to dissipate the effects of the serious and pervasive unfair labor practices committed by the Respondent and to ensure that a fair rerun election is possible. In recent cases, the Board has relied upon some of the same factors that traditionally warrant a remedial bargaining order as sufficient to justify less extraordinary but nonetheless nontraditional remedies. *Federated Logistics & Operations*, 340 NLRB 255, 256, 258 (2003); *Audubon Re-*

gional Medical Center, 331 NLRB 374, 378 (2000). To remedy any lingering effect that Glickman's threats of closure may have, I shall recommend that he be ordered to read the notice to the employees at captive audience meetings similar to those he conducted in April, before the election. Moreover, in order to give the Union an equal opportunity to counteract the unlawful campaign engaged in by the Respondent prior to the last election, I shall recommend that the Respondent furnish the Union with an updated list of unit employees' names and addresses within 14 days of issuance of a final order in this case and that the Respondent update this information every 6 months until a fair election has been certified by the Board. Finally, because of the variety of violations found and their serious nature, evidencing a general disregard for employees' rights under the Act, and in order to ensure that the Respondent is not tempted to devise new or creative ways to unlawfully interfere with its employees' free choice in the rerun election, I shall recommend a broad order, prohibiting the Respondent from restraining, coercing, or otherwise interfering with employees Section 7 rights in "any other manner," rather than merely in any manner similar to the unfair labor practices found here. Because it appeared from the testimony of some of the witnesses called by the Respondent that some unit employees are not native English speakers and may have difficulty understanding a notice posted and read in English, I shall recommend that the notice be posted in Spanish, Portuguese, and Haitian Creole, in addition to English, and that interpreters be available at Glickman's meetings to translate for employees who do not understand English. With these special remedies, in addition to those traditionally ordered, a free and fair rerun election will be more than a "slight possibility" and will better reflect the employees' true desires than a card-based bargaining order would.

[Recommended Order and Direction of Second Election omitted from publication.]

APPENDIX A

THE UNION'S OBJECTIONS⁶⁶

1. From the outset of the Union's campaign, and continuing throughout the critical preelection period, the Employer engaged in the surveillance of employees engaged in union activities and/or created the impression with employees that their activities were under surveillance by the Employer.

2. From the outset of the Union's campaign and continuing throughout the critical preelection period, Employer agents, supporters or others acting in concert with them requested that employees disclose the union sympathies of their coworkers.

3. From the outset of the Union's campaign, and intensifying during the critical preelection period, the Employer forbade union supporters from discussing the union campaign at work while at the same time allowing and/or encouraging antiunion employees to discuss their antiunion sentiments with employees during worktime.

4. From the outset of the Union's campaign, and continuing throughout the critical preelection period, the Employer solic-

ited and/or encouraged employees to repudiate the Union and to revoke their signed union membership cards.

5. From the outset of the Union's campaign, and intensifying during the critical preelection period, Employer agents, supporters or others acting in concert with them made numerous statements regarding collective bargaining, jobs, loss of pension benefits, strikes and closure of the Jewish Home which, individually and collectively, were intended to convey to employees that selecting the Union would be futile and would inevitably lead to closure of the Jewish Home and/or a strike and loss of jobs through the hiring of permanent replacements.

6. From the outset of the Union's campaign and continuing throughout the critical preelection period, the Employer (which permitted off-duty employees on its premises for various purposes prior to the union organizing drive) denied union supporters off-duty access to the facility, and on at least one occasion, removed three (3) off-duty union supporters from the premises.

7. During the critical pre-election period, the Employer terminated union supporters Misty Hinds and Carmen Dyer, and suspended and terminated union supporter Farid Gauthier because of their support for, and activities on behalf of, the Union.

8. During the critical pre-election period, the Employer discriminated against union supporters by requiring that two (2) of the Union's election observers take the entire day of the election off from work while allowing the Employer's observers to work and take time off from their shifts to serve as the Employer's observers.

9. On both April 10th and 11th the Employer organized, allowed and paid eligible voters, at least some of whom were on duty at the time, to picket the entrance of the facility holding "Vote No" and other signs with various anti-union slogans.

10. During the critical preelection period, Employer agents, supporters, or others acting in concert with them bribed or otherwise attempt to illicitly influence the vote of eligible voters, as evidence by, but not limited to, offering to assist at least one employee in his attempt to obtain a "green card" from INS and generating free publicity for the musical band of two (2) other employees.

11. [Withdrawn]

12. During the critical preelection period, the Employer promoted three (3) former union supporters into leadership positions for the purpose of influencing their vote in the election and assisting management in conducting its anti-union campaign.

13. Following the outset of the Union's campaign, the Employer unilaterally changed terms and conditions of employment by granting a wage increase to eligible voters, and during the critical preelection period suggested that an additional wage increase would be forthcoming, for the purpose of influencing employee sentiment in regard to unionization.

14. [Withdrawn]

15. During the critical preelection period, management consultants, in the course of campaigning against the Union in their capacity as agents of the Employer, misrepresented to employees that they were agents of the National Labor Relations Board and disinterested parties to the election. The consultants rein-

⁶⁶ The Union withdrew Objections 11 and 14 on October 7, 2002, before issuance of the Regional Director's Report on Objections.

forced their sham claim that they were agents of the Board by distributing Board issued material to eligible voters.

16. Throughout the critical pre-election period the Employer and its agents threatened, coerced, harassed and intimidated

pro-union employees for exercising their rights under the NLRA to freely select the Union as their bargaining representative.